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Publications of the
Carnegie Endowment for International Peace
Division of International Law
Washington

PRIZE CASES

DECIDED IN THE

UNITED STATES SUPREME COURT

1789—1918

Including also cases on the instance side in which questions of Prize Law were involved

PREPARED IN THE DIVISION OF INTERNATIONAL LAW
OF THE CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE

UNDER THE SUPERVISION OF

JAMES BROWN SCOTT

DIRECTOR

VOLUME I

U. S. Naval War College Library

OXFORD
AT THE CLARENDON PRESS
1923

PRINTED IN ENGLAND
AT THE OXFORD UNIVERSITY PRESS

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PREFACE

DURING its existence of upwards of a century the Supreme Court of the United States has had occasion to consider and has decided many questions of Prize Law. The decisions of these questions, to be found here and there in the some 250 volumes of the Reported Cases of the Supreme Court, form but a small part of the labours of this august tribunal, but they have had great influence in shaping International Law and in bringing it to its present stage of development. Not a few of its decisions in matters of Prize have met with violent opposition at the time of their delivery, but they have stood the test of subsequent experience, and in the end they have had the good fortune to secure the approval not only of the naval profession but of intelligent jurists throughout the world.

Their collection and publication apart from the reports in which they are scattered would therefore seem not to require justification at this or at any other time. There are, however, at the present moment two reasons which serve to make their appearance peculiarly timely.

The first reason consists in the likelihood of the constitution at no distant date of an International Court of Justice which may be called upon to decide questions of Prize Law, and which would be greatly aided in its labours by the opinions of the Supreme Court of the United States, which may be properly considered as the only permanent Court of Prize in existence as it assuredly is the only court of a permanent nature hitherto created for a Union of States by the States forming that Union.

Indeed, controversies in Prize Cases between and among the American States in their war of Independence led, as is pointed out in the introduction to the Cases, to the formation of the first Federal Court of Appeals to be established for Prize

Cases, and when ' a more perfect Union ' of these States was formed by their present Constitution the Supreme Court of this Union of States was vested with final jurisdiction upon appeal in matters of Prize. In this respect the Federal Court of Appeals was therefore the precedent for the establishment of a Supreme Court for those States, just as the Supreme Court of the United States is a precedent for the Supreme Court of that looser Union which we call the ' Society of Nations '. The decisions of the Supreme Court in Prize Cases are not only in substance important contributions to the Law of Prize, but they are also in form, it is believed, safe and sure models for an International Court to follow in the consideration and decision of questions brought before it for judicial determination.

The second reason is more specific and concrete, inasmuch as the judgements of the Supreme Court in the matter of Prize, brought together within the narrow compass of three handy volumes, will be at the elbow of statesman, diplomat, or jurist who may have to consider and to pass upon the German Prize decisions rendered during the World War of 1914–19. The second paragraph of Article 440 of the Treaty of Peace between the Allied and Associated Powers on the one hand and Germany on the other, signed at Versailles June 28, 1919, provides that :

' The Allied and Associated Powers reserve the right to examine in such manner as they may determine all decisions and orders of German Prize Courts, whether affecting the property rights of nationals of those Powers or of neutral Powers. Germany agrees to furnish copies of all the documents constituting the record of the cases, including the decisions and orders made, and to accept and give effect to the recommendations made after such examination of the cases.'

The purpose of this provision, proposed by the American Commission to Negotiate Peace, adopted by the Conference, and embodied in the Treaty of Peace, was to subject the decisions of German Prize Courts to that standard of Law obtaining in Allied and Associated countries, not merely for the advantage of the enemies of Germany but for the protection of neutral nations which had suffered at the hands of Germany.

* * *

Through the courtesy of the Banks Law Publishing Company, which has generously granted permission to use the texts of these decisions contained in the official edition of the Supreme Court Reports, of which the Company owns the copyright, the Carnegie Endowment for International Peace is enabled to print the Prize decisions of the Supreme Court from official texts and to make the collection complete and available in three moderately sized volumes.

It is a pleasure to state that Henry G. Crocker, Esquire, a friend and colleague for many years, has furnished the elaborate and highly serviceable index covering more than forty finely printed pages.

The undersigned ventures to express the hope that this selection from the 250 volumes of Reported Cases will call attention to the vast stores of International Law, of which the Law of Prize is but a small although an important part, to be found in the official Reports of the Supreme Court of the United States.

JAMES BROWN SCOTT,
Director of the Division of International Law, Carnegie Endowment for International Peace.

PARIS, FRANCE,
July 15, 1919.

TABLE OF CONTENTS

PAGE

ALPHABETICAL LIST OF CASES xv

CASES CITED IN THE OPINIONS AND IN THE REPORTERS' NOTES . xxiii

INTRODUCTION 1

Glass et al. *v.* The Sloop Betsey (3 Dallas, 6) 1794 9

Penhallow et al. *v.* Doane's Administrators (3 Dallas, 54) 1795 . . 19

United States *v.* Richard Peters, District Judge (3 Dallas, 121) 1795 . 81

Talbot *v.* Jansen et al. (3 Dallas, 133) 1795 92

M'Donough *v.* Dannery, and the Ship Mary Ford (3 Dallas, 188) 1796 . 127

Geyer et al. *v.* Michel et al. and the Ship Den Onzekeren (3 Dallas, 285) 1796 137

Moodie *v.* The Ship Alfred (3 Dallas, 307) 1796 146

Moodie *v.* The Ship Phœbe Anne (3 Dallas, 319) 1796 147

Hills et al. *v.* Ross (3 Dallas, 331) 1796 148

Del Col *v.* Arnold (3 Dallas, 333) 1796 149

Talbot *v.* The Ship Amelia.—Seeman, Claimant (4 Dallas, 34) 1800 . 151

Bas *v.* Tingy [The Eliza] (4 Dallas, 37) 1800 153

Silas Talbot *v.* Hans Fred. Seeman [The Amelia] (1 Cranch, 1) 1801 . 163

United States *v.* Schooner Peggy (1 Cranch, 103) 1801 195

Alexander Murray *v.* Schooner Charming Betsy (2 Cranch, 64) 1804 . 201

William Maley *v.* Jared Shattuck (3 Cranch, 458) 1806 245

Jennings *v.* Carson (4 Cranch, 2) 1807 270

Fitzsimmons *v.* The Newport Insurance Company (4 Cranch, 185) 1808 288

Rose *v.* Himely (4 Cranch, 241) 1808 301

Hudson et al. *v.* Guestier, and Lafont *v.* Bigelow (4 Cranch, 293) 1808 . 337

Croudson et al. *v.* Leonard (4 Cranch, 434) 1808 341

Yeaton *v.* Fry (5 Cranch, 335) 1809 348

The Maryland Insurance Company *v.* Woods (6 Cranch, 29) 1810 . . 354

The Schooner Exchange *v.* M'Faddon et al. (7 Cranch, 116) 1812 . . 369

The Maryland Insurance Company *v.* Wood (7 Cranch, 402) 1813 . 391

William Williams et al. *v.* George Armroyd et al. [The Fortitude] (7 Cranch, 423) 1813 395

Livingston and Gilchrist *v.* The Maryland Insurance Company (7 Cranch, 506) 1813 404

M'Call et al. *v.* The Marine Insurance Company (8 Cranch, 59) 1814 . 435

Armitz Brown *v.* The United States (8 Cranch, 110) 1814 440

The Rapid.—Perry, master (8 Cranch, 155) 1814 474

The Alexander.—Picket, master (8 Cranch, 169) 1814 485

The Julia.—Luce, master (8 Cranch, 181) 1814 494

The Aurora.—Pike, master (8 Cranch, 203) 1814 511

The Adventure (8 Cranch, 221) 1814 524

The Venus.—Rae, master (8 Cranch, 253) 1814 530

PAGE

The Merrimack (8 Cranch, 317) 1814 578
The Frances.—Boyer, master [Thompson et al., claimants] (8 Cranch, 335) 1814 592
The Frances.—Boyer, master [Graham's claim] (8 Cranch, 348) 1814 . 602
The Frances.—Boyer, master [Dunham and Randolph's claim] (8 Cranch, 354) 1814 606
The Frances.—Boyer, master [Kennedy's claim] (8 Cranch, 358) 1814 . 609
The Frances.—Boyer, master [French's claim] (8 Cranch, 359) 1814 . 610
The Frances.—Boyer, master [Gillespie's claim] (8 Cranch, 363) 1814 . 613
The Sally.—Porter, master (8 Cranch, 382) 1814 619
The Euphrates (8 Cranch, 385) 1814 621
The Mary.—Stafford, master (8 Cranch, 388) 1814 624
The Frances.—Boyer, master [Irvin's claim] (8 Cranch, 418) 1814 . 631
The Thomas Gibbons.—Rockwell, master (8 Cranch, 421) 1814 . . 633
The St. Lawrence.—Webb, master (8 Cranch, 434) 1814 . . . 641
The Hiram.—Barker, master (8 Cranch, 444) 1814 649
The Joseph.—Sargeant, master (8 Cranch, 451) 1814 654
The Grotius.—Sheafe, master (8 Cranch, 456) 1814 659
The Brig Short Staple and cargo [Hallaway et al., claimants] *v.* The United States (9 Cranch, 55) 1815 663
The St. Lawrence.—Webb, master [M'Gregor and Penniman, claimants] (9 Cranch, 120) 1815 670
The Mary.—Stafford, master (9 Cranch, 126) 1815 672
The Frances.—Boyer, master [Dunham and Randolph's claim] (9 Cranch, 183) 1815 690
Thirty Hogsheads of Sugar [Adrian B. Bentzon, claimant] *v.* Boyle et al. [The Comet] (9 Cranch, 191) 1815 696
Cargo of the Ship Hazard *v.* Campbell et al. (9 Cranch, 205) 1815. . 702
Ship Societe, Martinson, master (9 Cranch, 209) 1815 . . . 706
The Schooner Adeline and cargo (9 Cranch, 244) 1815 708
The Brig Alerta and cargo [Brosquet, claimant] *v.* Blas Moran (9 Cranch, 359) 1815 742
The Grotius.—Sheafe, master (9 Cranch, 368) 1815 749
The Brig Concord.—Taylor, master (9 Cranch, 387) 1815 . . . 752
The Nereide.—Bennett, master (9 Cranch, 388) 1815 753
The Mary and Susan.—G. and H. Van Wagenen, claimants (1 Wheaton, 25) 1816 804
The Mary and Susan.—Richardson, claimant (1 Wheaton, 46) 1816 . 816
The Rugen.—Buhring, claimant (1 Wheaton, 62) 1816 . . . 824
The Venus.—Jademerowsky, claimant (1 Wheaton, 112) 1816 . . 831
The Astrea (1 Wheaton, 125) 1816 833
The Antonia Johanna (1 Wheaton, 159) 1816 835
The Nereid.—Pinto, claimant (1 Wheaton, 171) 1816 842
The St. Joze Indiano.—Lizaur, claimant (1 Wheaton, 208) 1816 . . 846
L'Invincible.—The Consul of France, and Hill and M'Cobb, claimants (1 Wheaton, 238) 1816 850
The Harrison.—Herbert, claimant (1 Wheaton, 298) 1816 . . . 862

PAGE
The Commercen.—Lindgren, claimant (1 Wheaton, 382) 1816 . . 863
The George, The Bothnea, and The Janstaff (1 Wheaton, 408) 1816 . 877
The St. Nicholas.—Meyer et al., claimants (1 Wheaton, 417) 1816 . 880
The Elsineur.—Jones, claimant (1 Wheaton, 439) 1816 . . . 888
The Hiram.—Cornthwait et al., claimants (1 Wheaton, 440) 1816 . 889
The Dos Hermanos.—Green, claimant (2 Wheaton, 76) 1817 . . 893
The Mary (2 Wheaton, 123) 1817 905
The Ariadne.—Goddard et al., claimants (2 Wheaton, 143) 1817 . . 910
The Fortuna.—Krause et al., claimants (2 Wheaton, 161) 1817 . . 913
The Bothnea and the Jahnstoff (2 Wheaton, 169) 1817 . . . 917
The Pizarro.—Hibberson and Yonge, claimants (2 Wheaton, 227) 1817 922
The George (2 Wheaton, 278) 1817 933
The Anna Maria (2 Wheaton, 327) 1817 938
The Eleanor.—Donnell, claimant (2 Wheaton, 345) 1817 . . . 942
The London Packet.—Merino, claimant (2 Wheaton, 371) 1817 . . 951
The Friendschaft.—Winn et al., claimants (3 Wheaton, 14) 1818. . 952
The Star.—Dickenson et al., claimants (3 Wheaton, 78) 1818 . . 973
Olivera *v.* The Union Insurance Company (3 Wheaton, 183) 1818 . 982
The Fortuna.—Krause et al., claimants (3 Wheaton, 236) 1818 . . 993
The Atalanta.—Foussat, claimant (3 Wheaton, 409) 1818 . . . 999
The Anne.—Barnabeu, claimant (3 Wheaton, 435) 1818 . . . 1012
The Amiable Nancy (3 Wheaton, 546) 1818 1019
The United States *v.* Palmer et al. (3 Wheaton, 610) 1818 . . . 1028
The Divina Pastora.—The Spanish Consul, claimant (4 Wheaton, 52) 1819 1047
The Experiment (4 Wheaton, 84) 1819 1055
The Caledonian.—Dickey, claimant (4 Wheaton, 100) 1819 . . . 1056
The Langdon Cheeves.—Lamb, claimant (4 Wheaton, 103) 1819 . . 1060
The Friendschaft.—Moreira, claimant (4 Wheaton, 105) 1819 . . 1061
The Estrella.—Hernandez, claimant (4 Wheaton, 298) 1819 . . 1063
The Neustra Senora de la Caridad.—Bages et al., claimants (4 Wheaton, 497) 1819 1070
The London Packet.—Merino, claimant (5 Wheaton, 132) 1820 . . 1073
The United States *v.* Klintock (5 Wheaton, 144) 1820 1080
The Josefa Segunda.—Carricabura et al., claimants (5 Wheaton, 338) 1820 1085
La Amistad de Rues.—Almiral, libellant (5 Wheaton, 385) 1820 . . 1096
The Amiable Isabella.—Munos, claimant (6 Wheaton, 1) 1821 . . 1101
The Bello Corrunes.—The Spanish Consul, claimant (6 Wheaton, 152) 1821 1154
The Nueva Anna and the Liebre.—The Spanish Consul, claimant (6 Wheaton, 193) 1821 1166
La Conception.—The Spanish Consul, claimant (6 Wheaton, 235) 1821 1167
The Santissima Trinidad and The St. Andre (7 Wheaton, 283) 1822 . 1170
The Gran Para.—The Consul General of Portugal, libellant (7 Wheaton, 471) 1822 1209

PAGE
The Santa Maria.—The Spanish Consul, libellant (7 Wheaton, 490) 1822 1219
The Arrogante Barcelones.—The Consul General of Spain, claimant (7 Wheaton, 496) 1822 1222
The Monte Allègre and the Rainha de los Anjos.—The Portuguese Consul General, libellant (7 Wheaton, 520) 1822 1235
La Nereyda.—The Spanish Consul, libellant (8 Wheaton, 108) 1823 . 1236
The Experiment (8 Wheaton, 261) 1823 1271
The Apollon.—Edon, claimant (9 Wheaton, 362) 1824 . . . 1275
The Fanny.—The Consul General of Portugal, libellant (9 Wheaton, 658) 1824 1285
The Dos Hermanos.—Shields, claimant (10 Wheaton, 306) 1825 . . 1292
The Marianna Flora.—The Vice-Consul of Portugal, claimant (11 Wheaton, 1) 1826 1295
The Palmyra.—Escurra, master (12 Wheaton, 1) 1827 . . . 1324
Edward Carrington et al. *v.* The Merchants' Insurance Company (8 Peters, 495) 1834 1337
The United States, appellants, *v.* Baptiste Guillem, claimant of one box of specie (11 Howard, 47) 1850 1362
Jecker et al. *v.* John B. Montgomery.—And John B. Montgomery, appellant, *v.* Jecker et al. (13 Howard, 498) 1851 1377
Jecker, Torre & Co., et al., claimants of the cargo of the Ship Admittance, *v.* John B. Montgomery, libellant (18 Howard, 110) 1855 . . 1397
The Brig Amy Warwick; the Schooner Crenshaw; the Barque Hiawatha; the Schooner Brilliante ['The Prize Cases'] (2 Black. 635) 1862 . 1413
United States *v.* Hallock (154 U.S. 537) 1864 1460
The Circassian (2 Wallace, 135) 1864 1461
The Venice (2 Wallace, 258) 1864 1481
United States *v.* Alexander (2 Wallace, 404) 1864 1496
The Baigorry (2 Wallace, 474) 1864 1510
The Andromeda (2 Wallace, 481) 1864 1515
The Josephine (3 Wallace, 83) 1865 1523
The Thompson (3 Wallace, 155) 1865 1530
The Cornelius (3 Wallace, 214) 1865 1536
The Cheshire (3 Wallace, 231) 1865 1544
The Sally Magee (3 Wallace, 451) 1865 1548
The Bermuda (3 Wallace, 514) 1865 1555
The Hart (3 Wallace, 559) 1865 1588
The Admiral (3 Wallace, 603) 1865 1589
The Herald (3 Wallace, 768) 1865 1598
The Nassau (4 Wallace, 634) 1866 1603
The Springbok (5 Wallace, 1) 1866 1609
The Peterhoff (5 Wallace, 28) 1866 1629
United States *v.* Weed et al. (5 Wallace, 62) 1866 1653
The Dashing Wave (5 Wallace, 170) 1866 1662
The Science (5 Wallace, 178) 1866 1667
The Volant (5 Wallace, 179) 1866 1668
The Teresita (5 Wallace, 180) 1866 1669

PAGE
The Jenny (5 Wallace, 183) 1866 1671
The Gray Jacket (5 Wallace, 342) 1866 1675
The Hampton (5 Wallace, 372) 1866 1695
The William Bagaley (5 Wallace, 377) 1866 1699
The Sir William Peel (5 Wallace, 517) 1866 1725
The Pearl (5 Wallace, 574) 1866 1739
The Sea Lion (5 Wallace, 630) 1866 1742
Mauran *v.* Insurance Company (6 Wallace, 1) 1867 1755
The Watchful (6 Wallace, 91) 1867 1765
The Sea Witch (6 Wallace, 242) 1867 1767
The Flying Scud (6 Wallace, 263) 1867 1768
The Adela (6 Wallace, 266) 1867 1771
The Battle (6 Wallace, 498) 1867 1772
The Wren (6 Wallace, 582) 1867 1773
The Georgia (7 Wallace, 32) 1868 1778
The Siren (7 Wallace, 152) 1868 1787
The Diana (7 Wallace, 354) 1868 1797
The Cotton Plant (10 Wallace, 577) 1870 1802
The Siren (13 Wallace, 389) 1871 1806
The Nuestra Senora de Regla (17 Wallace, 29)1872 1811
United States *v.* Diekelman (92 U.S. 520) 1875 1813
United States *v.* Ames (99 U.S. 35) 1878 1822
The Florida (101 U.S. 37) 1879 1832
Porter *v.* United States (106 U.S. 607) 1882 1836
Cushing *v.* Laird. Foster *v.* Cushing (107 U.S. 69) 1882 . . . 1841
The Nuestra Señora de Regla (108 U.S. 92) 1882 1854
The Olinde Rodrigues (174 U.S. 510) 1899 1863
Coudert, Administrator, *v.* United States (175 U.S. 178) 1899 . . 1885
The Pedro (175 U.S. 354) 1899 1889
The Guido (175 U.S. 382) 1899 1910
The Buena Ventura (175 U.S. 384) 1899 1911
The Paquete Habana. The Lola (175 U.S. 677) 1900 1920
The Newfoundland (176 U.S. 97) 1900 1954
The Adula (176 U.S. 361) 1900 1966
The Panama (176 U.S. 535) 1900 1994
The Benito Estenger (176 U.S. 568) 1900 2005
The Carlos F. Roses (177 U.S. 655) 1900 2015
The Manila Prize Cases (188 U.S. 254) 1903 2042
The Paquete Habana (189 U.S. 453) 1903 2065
The Steamship Appam (243 U.S. 124) 1917 2077

APPENDIX : Cases decided by the Federal Court of Appeals in cases of Capture
Miller et al., Libellants and Appellants, *v.* The Ship Resolution, and Ingersoll, Claimant and Appellee. Same *v.* The Cargo of the Ship Resolution, and O'Brien, Claimant and Appellant (2 Dallas, 1) 1781 2099
Miller, Libellant and Appellant, *v.* The Ship Resolution, &c. The Same *v.* The Cargo of The Ship Resolution, &c. (2 Dallas, 19) 1781 . 2116

PAGE

Darby et al., Appellants, *v.* The Brig Erstern et al. (2 Dallas, 34) 1782 2130
Keane et al., Libellants and Appellants, *v.* The Brig Gloucester et al., Appellees (2 Dallas, 36) 1782 2133
Stoddard, Appellant, *v.* Read, Appellee, and the Schooner Squirrel and Cargo (2 Dallas, 40) 1783 2136
Bain et al., Appellants, *v.* Schooner Speedwell et al., Appellees (2 Dallas, 40) 1784 2136
Lake, &c., *v.* Hulbert et al. (2 Dallas, 41) 1787 2136
The Owners of the Sloop Chester *v.* The Owners of the Brig Experiment et al. (2 Dallas, 41) 1787 2137

INDEX 2139

ALPHABETICAL LIST OF CASES

PAGE

Adela, The, *v.* United States (6 Wallace, 266) 1867 1771
Adeline, The (9 Cranch, 244) 1815 708
Admiral, The, *v.* United States (3 Wallace, 603) 1865 . . . 1589
Admittance, The [Jecker *v.* Montgomery] (13 Howard, 498) 1851 . 1377
Admittance, The [Jecker *v.* Montgomery] (18 Howard, 110) 1855 . 1397
Adula, The (176 U.S. 361) 1900 1966
Adventure, The (8 Cranch, 221) 1814 524
Alerta, The, *v.* Moran (9 Cranch, 359) 1815 742
Alexander, The (8 Cranch, 169) 1814 485
Alexander, United States *v.* (2 Wallace, 404) 1864 1496
Alfred, The, Moodie *v.* (3 Dallas, 307) 1796 146
Alliance Insurance Company, Mauran *v.* (6 Wallace, 1) 1867 . . 1755
Amelia, The, Talbot *v.* (4 Dallas, 34) 1800 151
Amelia, The [Talbot *v.* Seeman] (1 Cranch, 1) 1801 163
Ames, United States *v.* (99 U.S. 35) 1878 1822
Amiable Isabella, The (6 Wheaton, 1) 1821 1101
Amiable Nancy, The (3 Wheaton, 546) 1818 1019
Amy Warwick, The, The Crenshaw, The Hiawatha, The Brilliante (2 Black, 635) 1862 1413
Andromeda, The, *v.* United States (2 Wallace, 481) 1864 . . . 1515
Anna Maria, The (2 Wheaton, 327) 1817 938
Anne, The (3 Wheaton, 435) 1818 1012
Antonio Johanna, The (1 Wheaton, 159) 1816 835
Apollon, The (9 Wheaton, 362) 1824 1275
Appam, The (243 U.S. 124) 1917 2077
Ariadne, The (2 Wheaton, 143) 1817 910
Armroyd, Williams *v.* (7 Cranch, 423) 1813 395
Arnold, Del Col *v.* (3 Dallas, 333) 1796 149
Arrogante Barcelones, The (7 Wheaton, 496) 1822 1222
Astrea, The (1 Wheaton, 125) 1816 833
Atalanta, The (3 Wheaton, 409) 1818 999
Aurora, The (8 Cranch, 203) 1814 511

Baigorry, The, *v.* United States (2 Wallace, 474) 1864 1510
Bain *v.* The Speedwell (2 Dallas, 40) 1784 2136
Bas *v.* Tingy [The Eliza] (4 Dallas, 37) 1800 153
Battle, The [The James Battle *v.* United States] (6 Wallace, 498) 1867 1772
Bello Corrunes, The (6 Wheaton, 152) 1821 1154
Benito Estenger, The (176 U.S. 568) 1900 2005
Bentzon *v.* Boyle [Thirty Hogsheads of Sugar] (9 Cranch, 191) 1815 . 696
Berg *v.* British and African Steam Navigation Company [The Appam] (243 U.S. 124) 1917 2077
Bermuda, The [Haigh *v.* United States] (3 Wallace, 514) 1865 . . 1555
Betsey, The, Glass *v.* (3 Dallas, 6) 1794 9
Bigelow, Lafont *v.* (4 Cranch, 293) 1808 337

PAGE

Bothnea, The [The George, &c.] (1 Wheaton, 408) 1816 . . . 877
Bothnea, The, and The Jahnstoff (2 Wheaton, 169) 1817 . . . 917
Boyle, Thirty Hogsheads of Sugar (Bentzon, claimant) *v.* (9 Cranch, 191) 1815 696
Brilliante, The (2 Black, 635) 1862 1413
British and African Steam Navigation Company, Berg *v.* [The Appam] (243 U.S. 124) 1917 2077
Brown *v.* United States (8 Cranch, 110) 1814 440
Buena Ventura, The, *v.* United States (175 U.S. 384) 1899 . . . 1911

Caledonian, The (4 Wheaton, 100) 1819 1056
Campbell, The Hazard *v.* (9 Cranch, 205) 1815 702
Carlos F. Roses, The (177 U.S. 655) 1900 2015
Carrington *v.* The Merchants' Insurance Company (8 Peters, 495) 1834 . 1337
Carson, Jennings *v.* (4 Cranch, 2) 1807 270
Charming Betsy, Murray *v.* (2 Cranch, 64) 1804 201
Cheshire, The, *v.* United States (3 Wallace, 231) 1865 1544
Chester, The, *v.* The Experiment (2 Dallas, 41) 1787 2137
Circassian, The [Hunter *v.* United States] (2 Wallace, 135) 1864 . 1461
Collins *v.* The Florida (101 U.S. 37) 1879 1832
Comet, The [Thirty Hogsheads of Sugar, &c.] (9 Cranch, 191) 1815 . 696
Commercen, The (1 Wheaton, 382) 1816 863
Concord, The (9 Cranch, 387) 1815 752
Cooke, United States *v.* (2 Wallace, 258) 1864 1481
Cornelius, The [The Elmira Cornelius *v.* United States] (3 Wallace, 214) 1865 1536
Cotton Plant, The, *v.* United States (10 Wallace, 577) 1870 . . . 1802
Coudert *v.* United States (175 U.S. 178) 1899 1885
Crenshaw, The (2 Black, 635) 1862 1413
Croudson *v.* Leonard (4 Cranch, 434) 1808 341
Currie *v.* United States [The Amy Warwick, &c.] (2 Black, 635) 1862 . 1413
Cushing *v.* Laird (107 U.S. 69) 1882 1841

Dannery, M'Donough *v.* [The Ship Mary Ford] (3 Dallas, 188) 1796 . 127
Darby *v.* The Erstern (2 Dallas, 34) 1782 2130
Dashing Wave, The, United States *v.* (5 Wallace, 170) 1866 . . 1662
Del Col *v.* Arnold (3 Dallas, 333) 1796 149
Den Onzekeren [Geyer *v.* Michel] (3 Dallas, 285) 1796 . . . 137
Dewey, United States *v.* [The Manila Prize Cases] (188 U.S. 254) 1903. 2042
Diana, The, United States *v.* (7 Wallace, 354) 1868 1797
Diekelman, United States *v.* (92 U.S. 520) 1875 1813
Divina Pastora, The (4 Wheaton, 52) 1819 1047
Doane, Penhallow *v.* (3 Dallas, 54) 1795 19
Dos Hermanos, The [Green's Claim] (2 Wheaton, 76) 1817 . . 893
Dos Hermanos, The [Shields' Claim] (10 Wheaton, 306) 1825 . . 1292

Eleanor, The (2 Wheaton, 345) 1817 942
Eliza, The [Bas *v.* Tingy] (4 Dallas, 37) 1800 153
Elmira Cornelius [The Cornelius] (3 Wallace, 214) 1865 . . . 1536
Elsineur, The (1 Wheaton, 439) 1816 888

PAGE

Erstern, The, Darby *v.* (2 Dallas, 34) 1782 2130
Estrella, The (4 Wheaton, 298) 1819 1063
Euphrates, The (8 Cranch, 385) 1814 621
Exchange, The, *v.* M'Faddon (7 Cranch, 116) 1812 369
Experiment, The (4 Wheaton, 84) 1819 1055
Experiment, The (8 Wheaton, 261) 1823 1271
Experiment, The, The Chester *v.* (2 Dallas, 41) 1787 2137

Fanny, The (9 Wheaton, 658) 1824 1285
Fitzsimmons *v.* The Newport Insurance Company (4 Cranch, 185) 1808 288
Florida, The, Collins *v.* (101 U.S. 37) 1879 1832
Flying Scud, The, *v.* United States (6 Wallace, 263) 1867 . . . 1768
Fortitude, The [Williams *v.* Armroyd] (7 Cranch, 423) 1813 . . 395
Fortuna, The (2 Wheaton, 161) 1817 913
Fortuna, The (3 Wheaton, 236) 1818 993
Frances, The [Thompson's Claim] (8 Cranch, 335) 1814 . . . 592
Frances, The [Graham's Claim] (8 Cranch, 348) 1814 . . . 602
Frances, The [Dunham and Randolph's Claim] (8 Cranch, 354) 1814 . 606
Frances, The [Kennedy's Claim] (8 Cranch, 358) 1814 . . . 609
Frances, The [French's Claim] (8 Cranch, 359) 1814 610
Frances, The [Gillespie's Claim] (8 Cranch, 363) 1814 . . . 613
Frances, The [Irvin's Claim] (8 Cranch, 418) 1814 631
Frances, The [Dunham and Randolph's Claim] (9 Cranch, 183) 1815 . 690
Friendschaft, The [Winn's Claim] (3 Wheaton, 14) 1818 . . . 952
Friendschaft, The [Moreira's Claim] (4 Wheaton, 105) 1819 . . 1061
Fry *v.* United States [The Sally Magee] (3 Wallace, 451) 1865 . . 1548
Fry, Yeaton *v.* (5 Cranch, 335) 1809 348

George, The, The Bothnea, and The Janstaff (1 Wheaton, 408) 1816 . 877
George, The (2 Wheaton, 278) 1817 933
Georgia, The, *v.* United States (7 Wallace, 32) 1868 1778
Geyer *v.* Michel [The Den Onzekeren] (3 Dallas, 285) 1796 . . . 137
Glass *v.* The Betsy (3 Dallas, 6) 1794 9
Gloucester, The, Keane *v.* (2 Dallas, 37) 1782 2133
Grand Sachem, The [Del Col *v.* Arnold] (3 Dallas, 333) 1796 . . 149
Gran Para, The (7 Wheaton, 471) 1822 1209
Gray Jacket, The [The Gray Jacket *v.* United States] (5 Wallace, 342) 1866 1675
Grotius, The (8 Cranch, 456) 1814 659
Grotius, The (9 Cranch, 368) 1815 749
Guestier, Hudson *v.* (4 Cranch, 293) 1808 337
Guido, The (175 U.S. 382) 1899 1910
Guillem, United States *v.* (11 Howard, 47) 1850 1362

Habana, The [The Lola] (175 U.S. 677) 1900 1920
Habana, The, United States *v.* (189 U.S. 453) 1903 2065
Haigh *v.* United States [The Bermuda] (3 Wallace, 514) 1865 . . 1555
Hallock, United States *v.* (154 U.S. 537) 1864 1460
Hampton, The, *v.* United States (5 Wallace, 372) 1866 . . . 1695

PAGE
Harlan *v.* United States [The Nassau] (4 Wallace, 634) 1866 . . 1603
Harrison, The (1 Wheaton, 298) 1816 862
Hart, The [The Stephen Hart *v.* United States] (3 Wallace, 559) 1865 . 1588
Hazard, The, *v.* Campbell (9 Cranch, 205) 1815 702
Herald, The, *v.* United States (3 Wallace, 768) 1865 1598
Hiawatha, The (2 Black, 635) 1862 1413
Hills *v.* Ross (3 Dallas, 331) 1796 148
Himely, Rose *v.* (4 Cranch, 241) 1808 301
Hiram, The (8 Cranch, 444) 1814 649
Hiram, The (1 Wheaton, 440) 1816 889
Hudson *v.* Guestier (4 Cranch, 293) 1808 337
Hulbert, Lake *v.* (2 Dallas, 41) 1787 2136
Hunter *v.* United States [The Circassian] (2 Wallace, 135) 1864 . . 1461

Insurance Company, Mauran *v.* (6 Wallace, 1) 1867 1755
Isabella Thompson [The Thompson] (3 Wallace, 155) 1865 . . 1530

Jahnstoff, The [The Bothnea and] (2 Wheaton, 345) 1817 . . . 917
Jansen, Talbot *v.* (3 Dallas, 133) 1795 92
Janstaff, The [The George, &c.] (1 Wheaton, 408) 1816 . . . 877
James Battle, The, *v.* United States [The Battle] (6 Wallace, 498) 1867 1772
Jecker *v.* Montgomery (13 Howard, 498) 1851 1377
Jecker *v.* Montgomery (18 Howard, 110) 1855 1397
Jennings *v.* Carson (4 Cranch, 2) 1807 270
Jenny, The, United States *v.* (5 Wallace, 183) 1866 1671
Josefa Segunda, The (5 Wheaton, 338) 1820 1085
Joseph, The (8 Cranch, 451) 1814 654
Josephine, The [Queyrouze *v.* United States] (3 Wallace, 83) 1865 . 1523
Julia, The (8 Cranch, 181) 1814 494

Keane *v.* The Gloucester (2 Dallas, 37) 1782 2133
Klintock, United States *v.* (5 Wheaton, 144) 1820 1080

La Amistad de Rues (5 Wheaton, 385) 1820 1096
La Conception (6 Wheaton, 235) 1821 1167
Lafont *v.* Bigelow [Hudson *v.* Guestier] (4 Cranch, 293) 1808 . . 337
Laird, Cushing *v.* (107 U.S. 69) 1882 1841
Lake *v.* Hulbert (2 Dallas, 41) 1787 2136
La Nereyda (8 Wheaton, 108) 1823 1236
Langdon Cheeves, The (4 Wheaton, 103) 1819 1060
Leonard, Croudson *v.* (4 Cranch, 434) 1808 341
Liebre, The [The Nueva Anna] (6 Wheaton, 193) 1821 . . . 1166
L'Invincible (1 Wheaton, 238) 1816 850
Livingston *v.* Maryland Insurance Company (7 Cranch, 506) 1813 . 404
Lola, The [The Habana] (175 U.S. 677) 1900 1920
London Packet, The [Merino's Claim] (2 Wheaton, 371) 1817 . . 951
London Packet, The [Merino's Claim] (5 Wheaton, 132) 1820 . . 1073

M'Call *v.* Marine Insurance Company (8 Cranch, 59) 1814 . . . 435
M'Donough *v.* Dannery [The Mary Ford] (3 Dallas, 188) 1796 . . 127

PAGE
M'Faddon, The Exchange *v.* (7 Cranch, 116) 1812 369
Maley *v.* Shattuck (3 Cranch, 458) 1806 245
Manila Prize Cases, The [United States *v.* Dewey] (188 U.S. 254) 1903 . 2042
Marianna Flora, The (11 Wheaton, 1) 1826 1295
Marine Insurance Company, M'Call *v.* (8 Cranch, 59) 1814 . . . 435
Mary, The (8 Cranch, 388) 1814 624
Mary, The (9 Cranch, 126) 1815 672
Mary, The (2 Wheaton, 123) 1817 905
Mary and Susan, The [G. and H. Van Wagenen's Claim] (1 Wheaton, 25) 1816 804
Mary and Susan, The [Richardson's Claim] (1 Wheaton, 46) 1816 . 816
Mary Ford, The [M'Donough *v.* Dannery] (3 Dallas, 188) 1796 . . 127
Maryland Insurance Company, Livingston *v.* (7 Cranch, 506) 1813 . 404
Maryland Insurance Company *v.* Woods (6 Cranch, 29) 1810 . . 354
Maryland Insurance Company *v.* Wood (7 Cranch, 402) 1813 . . 391
Mauran *v.* Insurance Company [Mauran *v.* Alliance Insurance Company] (6 Wallace, 1) 1867 1775
Merchants' Insurance Company, Carrington *v.* (8 Peters, 495) 1834 . 1337
Merrimack, The (8 Cranch, 317) 1814 578
Michel, Geyer *v.* (3 Dallas, 285) 1796 137
Miller *v.* The Resolution (2 Dallas, 1) 1781 2099
Miller *v.* The Resolution (2 Dallas, 19) 1781 2116
Miller *v.* United States [The Hiawatha] (2 Black, 635) 1862 . . 1413
Mrs. Alexander's Cotton, United States *v.* (2 Wallace, 404) 1864 . . 1496
Monte Allegre and The Rainha de los Anjos (7 Wheaton, 520) 1822 . 1235
Montgomery, Jecker *v.* (13 Howard, 498) 1851 1377
Montgomery, Jecker *v.* (18 Howard, 110) 1855 1397
Moodie *v.* The Alfred (3 Dallas, 307) 1796 146
Moodie *v.* The Phœbe Anne (3 Dallas, 319) 1796 147
Moran, The Alerta *v.* (9 Cranch, 359) 1815 742
Murray *v.* Charming Betsy (2 Cranch, 64) 1804 201

Nassau, The [Harlan *v.* United States] (4 Wallace, 634) 1866 . . 1603
Nereide, The (9 Cranch, 388) 1815 753
Nereid, The (1 Wheaton, 171) 1816 842
Neustra Senora de la Caridad, The (4 Wheaton, 497) 1819. . . 1070
Newfoundland, The (176 U.S. 97) 1900 1954
Newport Insurance Company, Fitzsimmons *v.* (4 Cranch, 185) 1808 . 288
Nuestra Señora de Regla, The United States *v.* (17 Wallace, 29) 1872 . 1811
Nuestra Señora de Regla, The United States *v.* (108 U.S. 92) 1882 . 1854
Nueva Anna, The, and The Liebre (6 Wheaton, 193) 1821 . . . 1166

Olinde Rodrigues, The (174 U.S. 510) 1899 1863
Olivera *v.* The Union Insurance Company (3 Wheaton, 183) 1818 . . 982

Palmer, United States *v.* (3 Wheaton, 610) 1818 1028
Palmyra, The (12 Wheaton, 1) 1827 1324
Panama, The (176 U.S. 535) 1900 1994
Paquete Habana, The [The Lola] (175 U.S. 677) 1900 . . . 1920
Paquete Habana, The (189 U S. 453) 1903 2065

PAGE

Pearl, The, United States *v.* (5 Wallace, 574) 1866 1742
Pedro, The (175 U.S. 354) 1899 1889
Peggy, The, United States *v.* (1 Cranch, 103) 1801 195
Penhallow *v.* Doane (3 Dallas, 54) 1795 19
Peterhoff, The, *v.* United States (5 Wallace, 28) 1866 1629
Phœbe Anne, The, Moodie *v.* (3 Dallas, 319) 1796 147
Pizarro, The (2 Wheaton, 227) 1817 922
Porter *v.* United States [United States *v.* Steam Vessels of War] (106 U.S. 607) 1882 1836
'Prize Cases, The' (2 Black, 635) 1862 1413

Queyrouze *v.* United States [The Josephine] (3 Wallace, 83) 1865 . 1523

Rainha de los Anjos, The [The Monte Allegre] (7 Wheaton, 520) 1822 . 1235
Rapid, The (8 Cranch, 155) 1814 474
Read, Stoddard *v.* (2 Dallas, 40) 1783 2136
Resolution, The, Miller *v.* (2 Dallas, 1) 1781 2099
Resolution, The, Miller *v.* (2 Dallas, 19) 1781 2116
Rose *v.* Himely (4 Cranch, 241) 1808 301
Ross, Hills *v.* (3 Dallas, 331) 1796 148
Rugen, The (1 Wheaton, 62) 1816 824

St. Andre [The Santissima Trinidad] (7 Wheaton, 283) 1822 . . 1170
St. Joze Indiano, The (1 Wheaton, 208) 1816 846
St. Lawrence, The (8 Cranch, 434) 1814 641
St. Lawrence, The [M'Gregor and Penniman's Claim] (9 Cranch, 120) 1815 670
St. Nicholas, The (1 Wheaton, 417) 1816 880
Sally, The (8 Cranch, 382) 1814 619
Sally Magee, The [Fry *v.* United States] (3 Wallace, 451) 1865 . . 1548
Santa Maria, The (7 Wheaton, 490) 1822 1219
Santissima Trinidad, The, and The St. Andre (7 Wheaton, 283) 1822 . 1170
Science, The, United States *v.* (5 Wallace, 178) 1866 1667
Sea Lion, The, *v.* United States (5 Wallace, 630) 1866 1742
Sea Witch, The, United States *v.* (6 Wallace, 242) 1867 . . . 1767
Seeman, Talbot *v.* (4 Dallas, 34) 1800 151
Seeman, Talbot *v.* (1 Cranch, 1) 1801 163
Shattuck, Maley *v.* (3 Cranch, 458) 1806 245
Short Staple, The (9 Cranch, 55) 1815 663
Siren, The (7 Wallace, 152) 1868 1787
Siren, The, *v.* United States (13 Wallace, 389) 1871 1806
Sir William Peel, The, United States *v.* (5 Wallace, 517) 1866 . . 1725
Societe, The (9 Cranch, 209) 1815 706
Speedwell, The, Bain *v.* (2 Dallas, 40) 1784 2136
Springbok, The (5 Wallace, 1) 1866 1609
Star, The (3 Wheaton, 78) 1818 973
Steam Vessels of War, United States *v.* (106 U.S. 607) 1882 . . 1836
Stephen Hart, The [The Hart] (3 Wallace, 559) 1865 . . . 1588
Stoddard *v.* Read (2 Dallas, 40) 1783 2136

PAGE

Talbot *v.* The Amelia (4 Dallas, 34) 1800 151
Talbot *v.* Jansen (3 Dallas, 133) 1795 92
Talbot *v.* Seeman [The Amelia] (1 Cranch, 1) 1801 163
Teresita, The, United States *v.* (5 Wallace, 180) 1866 1669
Thirty Hogsheads of Sugar (Bentzon, claimant) *v.* Boyle (9 Cranch, 191) 1815 696
Thomas Gibbons, The (8 Cranch, 421) 1814 633
Thompson, The [The Isabella Thompson *v.* United States] (3 Wallace, 155) 1865 1530
Tingy, Bas *v.* [The Eliza] (4 Dallas, 32) 1800 153

Union Insurance Company, Olivera *v.* (3 Wheaton, 183) 1818 . . 982
United States, The Adela *v.* (6 Wallace, 266) 1867 1771
Admiral, The, *v.* (3 Wallace, 603) 1865 . . . 1589
v. Alexander [Mrs. Alexander's Cotton] (2 Wallace, 404) 1864 1496
v. Ames (99 U.S. 35) 1878 1822
Andromeda, The, *v.* (2 Wallace, 481) 1864 . . . 1515
Baigorry, The, *v.* (2 Wallace, 474) 1864 . . . 1510
Battle, The, *v.* (6 Wallace, 498) 1867 1772
Brown *v.* (8 Cranch, 110) 1814 440
Buena Ventura, The, *v.* (175 U.S. 384) 1899 . . . 1911
Cheshire, The, *v.* (3 Wallace, 231) 1865 . . . 1544
v. Cooke [The Venice] (2 Wallace, 258) 1864 . . 1481
Cornelius, The, *v.* (3 Wallace, 214) 1865 . . . 1536
Cotton Plant, The, *v.* (10 Wallace, 577) 1870 . . 1802
Coudert *v.* (175 U.S. 178) 1899 1885
Currie *v.* [The Amy Warwick] (2 Black, 635) 1862 . 1413
v. The Dashing Wave (5 Wallace, 170) 1866 . . . 1662
v. Dewey [The Manila Prize Cases] (188 U.S. 254) 1903 . 2042
v. Diana, The (7 Wallace, 354) 1868 1797
v. Diekelman (92 U.S. 520) 1875 1813
Flying Scud, The, *v.* (6 Wallace, 263) 1867 . . . 1768
Fry *v.* [The Sally Magee] (3 Wallace, 451) 1865 . . 1548
Georgia, The, *v.* (7 Wallace, 32) 1868 1778
Gray Jacket, The, *v.* (5 Wallace, 342) 1866 . . . 1675
v. Guillem (11 Howard, 47) 1850 1362
v. Habana, The [The Lola] (175 U.S. 677) 1900 . . 1920
Haigh *v.* (3 Wallace, 514) 1865 1555
v. Hallock (154 U.S. 537) 1864 1460
Hampton, The, *v.* (5 Wallace, 372) 1866 . . . 1695
Harlan *v.* [The Nassau] (4 Wallace, 634) 1866 . . 1603
Hart, The, *v.* (3 Wallace, 559) 1865 1588
Herald, The, *v.* (3 Wallace, 768) 1865 1598
Hunter *v.* [The Circassian] (2 Wallace, 135) 1864 . . 1461
v. Jenny, The (5 Wallace, 183) 1866 1671
v. Klintock (5 Wheaton, 144) 1820 1080
Miller *v.* [The Hiawatha] (2 Black, 635) 1862 . . 1413
v. Nuestra Señora de Regla, The (17 Wallace, 29) 1872 . 1811
v. Nuestra Señora de Regla, The (108 U.S. 92) 1882 . 1854

PAGE

United States (*continued*):—
v. Palmer (3 Wheaton, 610) 1818 1028
v. Pearl, The (5 Wallace, 574) 1866 1739
v. Peggy, The (1 Cranch, 103) 1801 195
Peterhoff, The, *v.* (5 Wallace, 28) 1866 . . . 1629
v. Peters (3 Dallas, 121) 1795 81
Porter *v.* (106 U.S. 607) 1882 1836
Preciat *v.* [The Brilliante] (2 Black, 635) 1862 . . 1413
Queyrouze *v.* [The Josephine] (3 Wallace, 83) 1865 . 1523
v. Science (5 Wallace, 178) 1866 1667
Sea Lion, The, *v.* (5 Wallace, 630) 1866 . . . 1742
v. Sea Witch, The (6 Wallace, 242) 1867 . . . 1767
Short Staple, The, *v.* (9 Cranch, 55) 1815 . . . 663
v. Sir William Peel, The (5 Wallace, 517) 1866 . . 1725
Siren, The, *v.* (7 Wallace, 152) 1868 1787
Siren, The, *v.* (13 Wallace, 389) 1871 1806
Springbok, The, *v.* (5 Wallace, 1) 1866 1609
v. Steam Vessels of War [Porter *v.* United States] (106 U.S. 607) 1882 1836
Stephen Hart *v.* (3 Wallace, 559) 1865 1588
v. Teresita, The (5 Wallace, 180) 1866 1669
Thompson, The, *v.* (3 Wallace, 155) 1865 . . . 1530
v. Venice, The [United States *v.* Cooke] (2 Wallace, 258) 1864 1481
Volant, The, *v.* (5 Wallace, 179) 1866 1668
v. Watchful, The (6 Wallace, 91) 1867 1765
v. Weed (5 Wallace, 62) 1866 1653
William Bagaley, The, *v.* (5 Wallace, 377) 1866 . . 1699
Wren, The, *v.* (6 Wallace, 582) 1867 1773

Venice, The [United States *v.* Cooke] (2 Wallace, 258) 1864 . . 1481
Venus, The (8 Cranch, 253) 1814 530
Venus, The [Jademerowsky's Claim] (1 Wheaton, 112) 1816 . . 831
Volant, The, *v.* United States (5 Wallace, 179) 1866 1668

Watchful, The, United States *v.* (6 Wallace, 91) 1867 1765
Weed, United States *v.* (5 Wallace, 62) 1866 1653
William Bagaley, The, *v.* United States (5 Wallace, 377) 1866 . . 1699
Williams *v.* Armroyd [The Fortitude] (7 Cranch, 423) 1813 . . 395
Woods, Maryland Insurance Company *v.* (6 Cranch, 29) 1810 . . 354
Wood, Maryland Insurance Company *v.* (7 Cranch, 402) 1813 . . 391
Wren, The, *v.* United States (6 Wallace, 582) 1867 1773

Yeaton *v.* Fry (5 Cranch, 335) 1809 348

CASES CITED IN OPINIONS
AND IN THE REPORTERS' NOTES

PAGE

Abby, The, 5 C. Rob. 251 1479
Adela, The, 6 Wall. 266 1835
Adeline, The, 9 Cranch 244 . . . . . 980, 1659, 1828, 1882, 2021
Admiral, The, 3 Wall. 603 . . . . . 1822, 1923, 1973, 1989
Adonis, The, 5 C. Rob. 256 . . . . . 799, 1723
Adventure, The, 8 Cranch 221 . . . . . 834, 1795
Aigburth, The, Blatchford Pr. Cas. 635 1795
Airey *v.* Merrill, 2 Curtis 8 1724
Albemarle, The. *See* U. S. *v.* Steever.
Alerta, The, 9 Cranch 359 1058
Alexander, The, 8 Cranch 169 656
Alexander, The, 4 C. Rob. 93 . . . . . 1376, 1723
Alexander *v.* Ins. Co., 4 Cranch 370 991
Alexander's Cotton. *See* U. S. *v.* Alexander.
Aline and Fanny, The, Spinks' Prize Cases 322 1848
Aline and Fanny, The, 10 Moore's P. C. 491 1848
Allen *v.* Hitch, 2 Curtis 147 1724
Alligator, The, 1 Gallison 145 1826
Amado, The, Newberry 400 . . . . . 1980, 2010
Amalia, The, 34 Law Journal Adm. 21 2076
Amelia, The. *See* Talbot *v.* Seeman.
Amelia, The, 4 Philadelphia 417 1945
America, The, 3 C. Rob. 36 1547
American Construction Co. *v.* Jacksonville Ry., 148 U. S. 372 . . 1923, 1925
Amiable Isabella, The, 6 Wheat. 1 . . . . . 1359, 1849, 1981, 2015
Amiable Nancy, The, 3 Wheat. 546 . . . . . 1098, 1923
Amistad de Rues, The, 5 Wheat. 385 . . . . . 1835, 2097
Amy Warwick, The, 2 Sprague 150 . . . . . 2028, 2029, 2039, 2042
Amy Warwick, The, 2 Black 635 2039
Anderson *v.* Levan, 1 Watts and Sergeant (Pa.) 334 1831
Ann Caroline, The, 2 Wall. 538 1827
Anna Maria, The, 2 Wheat. 327 1027
Anne, The, 3 Wheat. 435 1835
Apollo, The, 4 C. Rob. 158 . . . . . 867, 1964, 1966
Apollon, The, 9 Wheat. 362 . . . . . 1336, 1535, 1850, 1862, 1882
Aquila, The, 1 C. Rob. 37 . . . . . 456, 739
Arabella, The, 2 Gallison 368 1395
Argo, The, Spinks' Prize Cases 52 ; 1 Spinks 375 . . . . . 1898, 1914
Ariadne, The, 2 Wheat. 143 . . . . . 1899, 1980, 1992, 1993
Arnold *v.* The United Ins. Co., 1 Johnson's Cases 363 821
Arthur, The, 1 Dodson 423 1869
Atalanta, The, 6 C. Rob. 440 868
Athol, The, 1 W. Rob. 374 . . . . . 1789, 1790
Atkins *v.* The Disintegrating Company, 18 Wall. 272 1847
Attorney General *v.* Weeden, Parker 267 . . . . . 462, 465
Aurora, The, 4 C. Rob. 218 . . . . . 591, 849
Aurora, The, 8 Cranch 203 . . . . . 1980, 1992, 1993

Baigorry, The, 2 Wall. 474 1522
Baltazzi *v.* Ryder, 12 Moore's P. C. 168. *See* The Panaghia Rhomba.
Baltic, The, 1 Acton 25 1358
Baltica, The, 11 Moore's P. C. 141 1785
Baltica, The, Spinks' Prize Cases 264 2014
Barker *v.* Blakes, 9 East K. B. 283 989
Battle, The, 6 Wall. 498 . . . . . 1794, 2025, 2034, 2036
Beckham *v.* Drake, 9 Meeson and Welsby 79 1830

PAGE
Belfast, The, 7 Wall. 624 1828
Beltzhoover *v.* The Commonwealth, 1 Watts (Pa.) 126 1831
Benito Estenger, The, 176 U. S. 568. . . . . 1980, 2020, 2030
Benton *v.* Woolsey and the Bank of Utica, 12 Pet. 27 1410
Berens *v.* Rucker, 1 Blackstone 313 1762
Bermuda, The, 3 Wall. 514 . . . . . 1623, 1647, 1649, 1898, 1904
Bernardi *v.* Motteux, 2 Douglas 575. 347
Bernon, The, 1 C. Rob. 102 550
Betsey, The. *See* Glass *v.* The Betsey.
Betsey, The, 1 C. Rob. 93 . . . . . 992, 993
Betsey, The, 1 C. Rob. 332 . . . . . 1473, 1973
Bilbie *v.* Lumley, 2 East K. B. 469 1831
Blagge *v.* The New York Ins. Co., 1 Caines' Rep. 565 888
Boedes Lust, The, 5 C. Rob. 233 . . . . . 555, 572
Booty in the Peninsula, 1 Haggard Adm. 39 1810
Bothnea, The, 2 Wheat. 169 936
Boussmaker, *Ex parte*, 13 Vesey Jr. 71 459
Bradstreet *v.* Neptune Ins. Co., 3 Sumner 600 1850
Branch *v.* U. S., 100 U. S. 673 . . . . . 1886, 1887, 1889
Bremen Flugge, The, 4 C. Rob. 90 1849
Briggs *v.* Light Boats, 1 Allen (Mass.) 157 1790
Bristow *v.* Towers, 6 Term Reports 35 459
Brown *v.* U. S., 8 Cranch 110 . . . . . 1439, 1452, 1945, 1949, 2057
Buck *v.* Fawcett, 3 Peere Williams 242 892
Buckingham *v.* McLean, 13 How. 150 1724
Buel *v.* Van Ness, 8 Wheat. 312 1925
Buena Ventura, The, 175 U. S. 384 1998
Buron *v.* Denman, 2 Exchequer 167. 2074

Caledonian, The, 4 Wheat. 100 1060
Calypso, The, 2 C. Rob. 154 888
Canter *v.* Ins. Co., 3 Peters 307 1724
Carey *v.* Houston and Texas Ry., 150 U. S. 170 1924
Carolina, The, 3 C. Rob. 75 1546
Carolina, The, 4 C. Rob. 256 . . . . . 868, 1586
Caroline, The, 7 Cranch 496 1658
Carrington *v.* Ins. Co., 8 Peters 495 . . . . . 1585, 1627
Cassius, The, 2 Dall. 365. . . . . 857, 858, 861, 862
Cassius, The. *See* U. S. *v.* Peters.
Catharina Elizabeth, The, 5 C. Rob. 232 . . . . . 783, 799, 800
Charlotte, The, 5 C. Rob. 280 456
Charlotte Christine, The, 6 C. Rob. 101 . . . . . 1544, 1964, 1966
Charlotte Sophia, The, 6 C. Rob. 204 note 1536
Charming Betsy, The, 2 Cranch 64 . . . . . 821, 2003
Cheshire, The, 3 Wall. 231 . . . . . 1899, 1973, 1987
Christiansberg, The, 6 C. Rob. 376 1358
Christopher, The, 2 C. Rob. 209 320
Church *v.* Hubbart, 2 Cranch 187 . . . . . 1355, 1360
Circassian, The, 2 Wall. 135 . . . 1597, 1898, 1904, 1970, 1972, 1973, 1987, 1989
Citade de Lisboa, The, 6 C. Rob. 358 932
Citto, The, 3 C. Rob. 38 567
Clara, The, 1 Swabey Adm. 3 1789
Clark *v.* Keith, 106 U. S. 464 1860
Collector, The, 6 Wheat. 194 1724
Columbia, The, 1 C. Rob. 154 . . . . . 1474, 1973
Comet, The, 5 C. Rob. 285 321
Comet, The, Edwards, 32 994
Commander-in-Chief, The, 1 Wall. 43 2075
Commercen, The, 1 Wheat. 382 . . . . . 1650, 2008
Concord, The, 9 Cranch 387 845
Constantia, The, 6 C. Rob. 461 note 868
Corier Maratimo, The, 1 C. Rob. 287 1862
Cotton Plant, The, 10 Wall. 577 1841

PAGE

Countess of Lauerdale, The, 4 C. Rob. 283 1849
Cowley *v.* Patch, 120 Mass. 137 1831
Croudson *v.* Leonard, 4 Cranch 434 . . . . . 684, 686, 1849
Curtissos' Case. *See* The Snelle Zeylder.

Dashing Wave, The, 5 Wall. 170 . . . . . 1668, 1883
Davis and Cargo, The, 6 Blatchford 138 1793
Del Col *v.* Arnold, 3 Dall. 333 . . . . . 861, 862, 1027, 1057
De Metton *v.* De Mello, 12 East K. B. 234 1853
Dempsey *v.* Chambers, 154 Mass. 330 2074
Den Onzekeren, 3 Dall. 285 147
Dewey *v.* U. S., 35 Court Claims 172 2045
Dewey *v.* U. S., 178 U. S. 510 2045
Diana, The, 5 C. Rob. 60 . . . . . 569, 571
Dillon *v.* Barnard, 21 Wall. 430 1830
Dinsman *v.* Wilkes, 12 How. 389 1408
District of Columbia *v.* Hutton, 143 U. S. 18 1927
Divina Pastora, The, 4 Wheat. 52 . . . . . 1073, 1458
Dole *v.* Merchants Marine Ins. Co., 51 Maine 464 1765
Dole *v.* New England Mutual Ins. Co., 6 Allen (Mass.) 373 1765
Dos Hermanos, The, 10 Wheat. 306. . . . . 1359, 1795, 1808
Drie Vrienden, The, 1 Dodson 269 994
Duchese, The, Swabey Adm. 364 1827
Duget *v.* Rhinelander, 1 Caine's Cases 25; 2 Johnson's Cases 476 . . . 821
Dundee, The, 1 Haggard Adm. 109 . . . . . 2054, 2055
Durousseau *v.* U. S., 6 Cranch 307 1927

Edward, The, 4 C. Rob. 68 . . . . . 870, 1358
Eendraught, The, 6 C. Rob. 359 note 932
Eenrom, The, 2 C. Rob. 1 888
Elizabeth, The, 4 C. Rob. note to table of cases 1358
Elsebe, The, 5 C. Rob. 173 . . . . 456, 791, 795, 800, 1359, 1808, 2061
Emulous, The, 1 Gallison 563 2057
Ernst Merck, The, Spinks' P. C. 98; 2 Spinks 87 2014
Erstern, The, 2 Dall. 34 933
Esposito *v.* Bowden, 7 Ellis and Blackburn 763 1721
Estrella, The, 4 Wheat. 298 . . . . . 1059, 1073, 2097
Etrusco, The, 3 C. Rob. 31 note 1771
Etrusco, The, 4 C. Rob. 262 note 456
Etta, The, 4 Am. Law Reg. (N.S.) 38 1785
Evert, The, 4 C. Rob. 354 867
Exchange, The, 7 Cranch 116 . . . . . 857, 1058, 1207, 1817
Exchange, The, 1 Edwards 39. . . . . 1376, 1723
Experiment, The, 2 Dall. 41 820
Experiment, The, 8 Wheat. 261 1801

Fair American, The, Adm. 1796 821
Fairfax *v.* Hunter, 7 Cranch 603 1045
Fanny, The, 1 Dodson 443 1010
Fanny and Elmira, The, Edwards' Adm. 117 1851
Faudel *v.* The Phoenix Insurance Co., 4 Sergeant and Rawle 29 1356
Fay *v.* Montgomery, 1 Curtis 266 1408
Fenix, The. *See* The Phoenix.
Fernandes *v.* De Costa, Park on Marine Insurance, 177 346
Fifield *v.* Ins. Co., 47 Penn. 166 1765
Fisk *v.* Henarie, 142 U. S. 459 . . . . . 1926, 1927
Fitzsimmons *v.* Ins. Co., 4 Cranch 185 . . . . . 342, 993, 1974, 1988
Flad Oyen, The, 1 C. Rob. 135 . . . . . 320, 528, 834
Flora, The, Law Rep. 1 Adm. 45 1827
Flying Scud, The, 6 Wall. 263. . . . . 2007, 2075
Ford *v.* Peering, 1 Vesey Jun. 72 1830
Fortuna, The, 1 Dodson 81 1723
Frances, The, 8 Cranch 418 601, 1773, 1794, 2023, 2028, 2029, 2034, 2035, 2037, 2039, 2040, 2041

PAGE

Franciska, The, 2 Spinks 113; Spinks' Prize Cases 111 . . . 1867, 1868
Franklin, The, 3 C. Rob. 217 . . . . . 870, 1358, 1585
Franklin, The, 4 C. Rob. 147 739
Franklin, The, 6 C. Rob. 127 893
Frau Ilsabe, The, 4 C. Rob. 63 1646
Frazer *v.* Bigelow Carpet Co., 141 Mass. 126 . . . 1474, 1867, 1973, 2076
Frederick Molke, The, 1 C. Rob. 86 993
Friendschaft, The, 4 Wheat. 105 . . . . . 1546, 1899
Friendship, The, 6 C. Rob. 420 . . . . . 866, 868, 869
Furtado *v.* Rodgers, 3 Bosanquet and Puller 191 465

Gale *v.* Laurie, 5 Barnewall and Cresswell 156 2054
Gelston *v.* Hoyt, 3 Wheat. 246 . . . . . 1045, 1054, 1277, 1281
General Hamilton, The, 6 C. Rob. 61 993
Genoa and its Dependencies, 2 Dodson 444 1810
Genoa. *See* Ships taken at Genoa.
George, The, 1 Mason 24 1535
George, The, 1 Wheat. 408 . . . . . 1055, 1272
George, The, 2 Wheat. 278 . . . . . 1273, 1274
Gertrude, The, Blatchford Pr. Cas. 374 1623
Gertruyda, The, 2 C. Rob. 211 . . . . . 456, 462
Geyer *v.* Michel. *See* Den Onzekeren.
Glass *v.* The Betsey, 3 Dall. 6 . 60, 71, 461, 462, 860, 1054, 1055, 1534, 1595, 1822, 1923, 2096
Glen, The, Blatchford Pr. Cas. 375 2075
Gordon *v.* Ogden, 3 Pet. 33 1923
Goss *v.* Withers, 2 Burrow 683 2102
Graaff Bernstorf, The, 3 C. Rob. 109 888
Grand Sachem, The. *See* Del Col *v.* Arnold.
Gray Jacket, The, 5 Wall. 342 1981
Griswold *v.* Waddington, 15 Johnson's Reports 57, Id. 438 1721
Grove *v.* O'Brien, 8 How. 429 1584
Gute Erwartung, The, 6 C. Rob. 182 . . . . . 1964, 1966

Habana, The. *See* The Paquete Habana.
Hadkinson *v.* Robinson, 3 Bosanquet and Puller 388 990
Hampton, The, 5 Wall. 372 . . . . 1773, 1794, 2024, 2034, 2036, 2037
Hannibal and Pomona, The, Lords 1800 821
Hans *v.* Louisiana, 134 U. S. 1. 1940
Happy Couple, The, Stewart Adm. (Nova Scotia) 65 2002
Harmony, The, 2 C. Rob. 322 566
Harmony, The, case before the Lords, 1803 821
Harrison, The, 1 Wheat. 298 . . . . . 1724, 2021
Harrison *v.* Nixon, 9 Peters 483 1724
Hart, The. *See* U. S. *v.* The Hart.
Helena, The, 4 C. Rob. 3 . . . . . 321, 327, 985
Helme *v.* Smith, 7 Bingham C. P. 709 1720
Hendric and Alida, Hay and Marriott 96 1849
Henrick and Maria, The, 1 C. Rob. 146 . . . . . 1970, 1986
Henrick and Maria, The, 4 C. Rob. 43 321
Hero, The, Brown and Lushington 447 1827
Hiawatha, The, 2 Black 677 1597
Higginson *v.* Pomroy, 11 Mass. 104 1356
Hilton *v.* Guyot, 159 U. S. 113 1938
Hiram, The, 1 Wheat. 440 . . . . . 1980, 1992, 1993
Hodge *v.* Attorney-General, 3 Younge and Collyer 342 1791
Hoogskarpel, Lords of Appeal, 1785. 1810
Hoop, The, 1 C. Rob. 196 . . . . . 504, 656, 1399, 1719
Hope, The, 1 Dodson 226 . . . . . 1980, 2010
Hope, The, 1 W. Rob. 154 1827
Hoppet, The, 7 Cranch 389 1657
Houseman *v.* The Schooner North Carolina, 15 Pet. 40 1828
Hubbard *v.* Soby, 146 U. S. 56 1925

PAGE

Hudson *v.* Guestier, 4 Cranch 293 1394
Hudson *v.* Guestier, 6 Cranch 281 402
Hughes *v.* Cornelius, 2 Shower K. B. 232 . . . 342, 343, 344, 345, 346, 348
Humble *v.* Hunter, 12 Law Rep. Q. B. 310 1830
Hunt *v.* Rousmaniere, 2 Mason 342 1832
Hunt *v.* Rousmaniere, 1 Pet. 1 1831

Ida, The, Spinks' Prize Cases 26; 1 Spinks 331 . . 2026, 2027, 2034, 2038
Immanuel, The, 2 C. Rob. 186 1627
Indian Chief, The, 3 C. Rob. 12 . . . . . 551, 566, 821
Indian Chief, The, 3 C. Rob. 22 1401
Industrie, The, Law Rep. 3 Adm. and Eccl. 303 1723
Ins. Co. *v.* Dunham, 11 Wall. 1 1926
Invincible, The, 1 Wheat. 238 . . 1054, 1057, 1058, 1059, 1068, 1206, 2097
Island Belle, The, 13 Fed. Cases 168 2014

James Cook, The, Edwards, 261 . . . . . 1547, 1723, 1973
Jecker *v.* Montgomery, 13 How. 498 . . . . 1398, 1410, 1658, 1719
Jecker *v.* Montgomery, 18 How. 110 . . . . . 1584, 2007
Jemmy, The, 4 C. Rob. 31 2013
Jenks *v.* Hallett, 1 Caine's Rep. 60 821
Jenks *v.* Lewis, 3 Mason 503 1923
Jennings *v.* Carson, 4 Cranch 2 . . . . 461, 1595, 1724, 1848, 1882
Jennings *v.* Carson, 1 Peters Admiralty 1 . . . . . 1595, 1822
Jenny, The, 5 Wall. 183 2015
Johan, The, Edwards 275 1940
Johanna Maria, The, Deane on Blockade 86 1971
John and Sarah, The, 2 Code des Prises (ed. 1784) 721, 901, 903 . 1930, 1933
Johnston and Wier *v.* Ludlow, 2 Johnson's Cases 481 . . . 821, 1356
Jones *v.* U. S., 137 U. S. 202 1935
Jonge Emilia, The, 3 C. Rob. 52 . . . . . 1586, 1980
Jonge Klassina, The, 5 C. Rob. 297 567
Jonge Lambert, The, 5 C. Rob. 54 note 739
Jonge Margaretha, The, 1 C. Rob. 189 . . . . . 866, 2009
Jonge Pieter, The, 4 C. Rob. 79 . . . . . 505, 509, 1401, 1648
Jonge Tobias, The, 1 C. Rob. 329 870
Joseph, The, 8 Cranch 451 . . . . 662, 1400, 1898, 1903, 1980, 2010
Joseph, The, 1 Gallison 545 1808
Josephine, The, 3 Wall. 83 . . . . . 1547, 1973
Juffrouw Elbrecht, The, 1 C. Rob. 127 1801
Juffrow Maria Schroeder, The, 3 C. Rob. 147 993
Julia, The, 8 Cranch 181. . . . . 523, 652, 653, 1980, 1992
Jungfre Maria, The, Hay and Marriott 273 1849

Kalamazoo, The, 9 Eng. Law and Equity 557, s. c. Jur. 885 . . . 1827
Key and Hubbard *v.* Pearse, cited in Le Caux *v.* Eden, 2 Doug. 594 . 462, 466
Kierlighett, The, 3 C. Rob. 96. 321
King *v.* Cornell, 106 U. S. 395 1927
King *v.* Hoare, 13 Meeson and Welsby 494 1829
Kleinwort *v.* Shepard, 1 Ellis and Ellis 447 1762

La Amistad de Rues, 5 Wheat. 385 . . . . . 1835, 2097
Labuan, The, Blatchford Pr. Cas. 165 2075
Laing *v.* United Ins. Co., 2 Johnson's Cases 174; Ibid. 487 . . . 1356
Lamar *v.* Browne, 92 U. S. 187 2074
Lamb *v.* Durant, 12 Mass. 54 1720
La Nereyda, 8 Wheat. 108 1235
La Nostra Segnora de la Piedad, 1 Pistoye et Duverdy, 331 . . 1931, 1934
Lau Ow Bew *v.* U. S., 144 U. S. 47 1925
La Virginie, 5 C. Rob. 98 566
Lawrence *v.* Minturn, 17 How. 100 . . . . . 1552, 1584, 2036
Lea *v.* Robeson, 12 Gray (Mass.) 280 1830
Le Caux *v.* Eden, 2 Douglas 594 1852
Le Louis, 2 Dodson 210 . . . . . 1322, 1335

PAGE

Leon *v.* Galceran, 11 Wall. 185 1828
Les Cinq Frères, 4 Lebeau's Nouveau Code des Prises 63 2010
Lickbarrow *v.* Mason, 6 East 20 note 2041
Lilla, The, 2 Sprague 177 1851
Lilla, The, 2 Clifford 169. . . . . 1851, 2015
Lincoln *v.* Claflin, 7 Wall. 132 2076
Lindo *v.* Rodney, 2 Douglas 613 note . 273, 284, 461, 462, 1807, 1847, 2056
L'Invincible, 1 Wheat. 238 . . . 1054, 1057, 1058, 1059, 1068, 1206, 2097
Lisette, The, 6 C. Rob. 387 . . . . . 994, 1479
Little *v.* Barreme, 2 Cranch 170 2074
Little William, The, 1 Acton 141 1973
Lively, The, 1 Gallison 315 . . . . . 1862, 2076
Livingston *v.* Ins. Co., 7 Cranch 506. 821
Locke *v.* U. S., 7 Cranch 339 1535
London Packet, The, 2 Wheat. 371 1553
London Packet, The, 5 Wheat. 132 2020
Lord Camden *v.* Home, 4 Term Reports 382 1828
Lord Hobart, The, 2 Dodson 100 1790
Lothian *v.* Henderson, 3 Bosanquet and Puller 499 . . . . 345, 346
Louis, Le, 2 Dodson 210 . . . . . 1322, 1336
Lubbock *v.* Rowcroft, 5 Espinasse 50 990
Luther *v.* Borden, 7 How. 1 1459
Lynchburg, The, Blatchford Pr. Cas. 49 . . . . 2028, 2041, 2042

McArdle *v.* The Irish Iodine Co., 15 Irish C. L. 146 1830
McCormick *v.* Sullivant, 10 Wheat. 192 2075
M'Donough *v.* Dannery. *See* The Mary Ford.
McLellan *v.* U. S., 1 Gallison 227 1827
McLish *v.* Roff, 141 U. S. 661 . . . . . 1923, 1925
Magnus, The, 1 C. Rob. 31 2022
Magoun *v.* New England Marine Ins. Co., 1 Story 157 1850
Malden *v.* Bartlett, Parker 105 456
Maley *v.* Shattuck, 3 Cranch 458 . . . . . 1515, 1850
Manro *v.* Almeida, 10 Wheat. 473 . . . . . 1822, 1847
Marbury *v.* Madison, 1 Cranch 137 1724
Margaret, The, 1 Acton 333 1358
Margaretha Charlotte, The, 3 C. Rob. 78 note 1547
Maria, The, 1 C. Rob. 340 . . . . . 791, 792, 793, 795
Maria, The, 5 C. Rob. 365 1536
Maria, The, 6 C. Rob. 201 . . . . . 994, 1536, 1646, 2010
Maria, The, 11 Moore's P. C. 271 1849
Maria Francoise, The, 6 C. Rob. 282 . . . 456, 462, 1359, 1808, 1811
Marianna, The, 6 C. Rob. 24 591, 633, 2026, 2028, 2029, 2034, 2037, 2039, 2040, 2041
Marianna Flora, The, 11 Wheat. 1 1336
Marquis de Somerueles, The, Stewart Adm. (Nova Scotia) 445, 482 . . 1945
Marquis of Huntly, The, 3 Haggard 246 1793
Marshall *v.* Ins. Co., 4 Cranch 202 991
Martin *v.* Hunter, 7 Cranch 603 1045
Mary, The, 9 Cranch 126 1849
Mary and Susan, The, 1 Wheat. 25 . . . . . 2024, 2034, 2035
Mary Ann, The, 8 Wheat. 380. 1658
Mary Ford, The, 3 Dall. 188 . . . . . 860, 862, 1056
Maryland Ins. Co. *v.* Woods, 6 Cranch 29 . . . . . 1450, 1974, 1989
Mason *v.* Eldred, 6 Wall. 231 1830
Medeiros *v.* Hill, 8 Bingham 231 1597
Melomane, The, 5 C. Rob. 41 . . . . . 456, 1359
Mercurius, The, 1 C. Rob. 80 . . . . . 1723, 1808, 1866
Mercurius, The, 1 C. Rob. 288. 1585
Merrimack, The, 8 Cranch 317 849
Minerva, The, Hay and Marriott 235 932
Minerva, The, 6 C. Rob. 396 . . . . . 1784, 1785
Moodie *v.* The Alfred, 3 Dall. 307 1057
Moodie *v.* The Phoebe Anne, 3 Dall. 319 . . . . . 146, 1057

PAGE

Mrs. Alexander's Cotton. *See* U. S. *v.* Alexander.
Murray *v.* The Charming Betsy. *See* The Charming Betsy
Murray *v.* Clarendon, Law Rep. 9 Equity 11 1830

Nancy, The, 3 C. Rob. 82 1547
Nancy, The, 3 C. Rob. 122 1358
Nancy, The, 1 Acton 57 1868
Nancy, The, 1 Acton 63 1868
Napoleon, The, Blatchford Pr. Cas. 296 1980
Nelly, The, 1 C. Rob. 219 . . . . . 621, 1401
Nelson *v.* U. S., Pet. C. C. 235 1826
Neptunus, The, 1 C. Rob. 170 . . . . . 993, 1473
Neptunus, The, 2 C. Rob. 110 . . . . . 1474, 1597, 1973
Neptunus, The, 3 C. Rob. 80 . . . . . 870, 1547
Nereide, The, 9 Cranch 388 . . . . . 931, 933, 1002, 1004, 1011
Nesbitt *v.* Berridge, 8 Law Times, N. S. 76 1830
Nesbitt *v.* Lushington, 4 Term Reports, 783 1763
Neustra Señora de la Caridad, The, 4 Wheat. 497 1059
Neutralitet, The, 3 C. Rob. 295 . . . . . 866, 870, 1358, 1585, 1966
North Carolina, The, 15 Pet. 40 1828
Noydt Gedacht, The, 2 C. Rob. 137 note 1931
Nuestra Señora de Regla, 108 U. S. 92 2075

Ocean, The, 3 C. Rob. 297 . . . . . 573, 994, 1648
Ocean, The, 5 C. Rob. 90 . . . . . 573, 1721
Octavia, The, 1 Mason 149 1827
Olinde Rodrigues, The, 174 U. S. 510 . . . . . 1919, 1966
Omnibus, The, 6 C. Rob. 71 2014
Ooster Eems, The, 1 C. Rob. 284 note 462
Orozembo, The, 6 C. Rob. 430 868

Palmyra, The, 12 Wheat. 1 . . . . . 1402, 1823
Panaghia Rhomba, The [Baltazzi *v.* Ryder], 12 Moore's P. C. 168 . 1597, 1723
Panama, The, 176 U. S. 535 2030
Paquete Habana, The, 175 U. S. 677 . . . . . 2057, 2061, 2073
Parker *v.* Ormsby, 141 U. S. 81 1923
Pedro, The, 175 U. S. 354 1911
Peggy, The, 4 C. Rob. 304 1827
Pégou, The, 2 Pistoye et Duverdy, Prises Maritimes 51 . . 225, 930, 2001
Pelaches's Case (or Pelachies, Pelagii), 1 Rolls 175; 3 Bulstrode 27; 4 Inst. 152 126
Penhallow *v.* Doane, 3 Dall. 54 . . . . . 461, 1850
Penny *v.* Martin, 4 Johnson's Chancery Cases 566 1831
Peterhoff, The, 5 Wall. 28 . . . . . 1883, 1904, 1999, 2001, 2007, 2030
Phillips *v.* Payne, 92 U. S. 130 1836
Phoenix, The, 3 C. Rob. 186 . . . . . 1395, 1547
Phoenix, The, 5 C. Rob. 20 . . . . . 700, 702
Phoenix, The, Spinks' Prize Cases; 1 Spinks' Eccl. and Adm. Rep. 306 1896, 1899, 1914, 1918
Phoenix Ins. Co. *v.* Pratt *et al.*, 2 Binney 308 888
Pigou, The. *See* The Pégou.
Pizarro, The, 2 Wheat. 227 . . . . . 1877, 1981, 1982, 2032
Pollard *v.* Vinton, 105 U. S. 7 2022
Polly, The, 2 C. Rob. 361 1584
Porter *v.* U. S., 106 U. S. 607 . . . . . 1860, 2052
Potsdam, The, 4 C. Rob. 89 993
Potts *v.* Bell, 8 Term Reports 548 . . . . . 656, 1719
Potts, *In re*, 166 U. S. 263 2075
Powell *v.* Hyde, 5 Ellis and Blackburn 607 . . . . . 1761, 1762
President, The, 5 C. Rob. 277 573
Primus, The, 29 Eng. Law and Equity 589 1723
Prize Cases, 2 Black 635 1461, 1492, 1507, 1597, 1652, 1973, 1986, 1992, 2007, 2034, 2039

PAGE

Prosperité, The, Hay and Marriott 164 1849
Radcliff *v.* Ins. Co., 7 Johnson's Reports 38 992
Ranger, The, 6 C. Rob. 125 . . . . . 870, 1586, 1980
Rapid, The, 8 Cranch 155 . . . . . 492, 620, 648, 656, 1399, 1719
Rebeckah, The, 1 C. Rob. 227. . . . . 456, 462, 466, 1808
Redmond *v.* Dickerson, 1 Stockton (N. J.) 507 1830
Reeve *v.* Attorney-General, 2 Atkyns 223 1791
Rendsborg, The, 4 C. Rob. 121 507
Rhinelander *v.* Ins. Co., 4 Cranch 29 991
Richmond, The, 5 C. Rob. 325 . . . . . 456, 870
Ringende Jacob, The, 1 C. Rob. 89 1585
Robertson *v.* Smith, 18 Johnson's Reports 459 1831
Roe *v.* Roe, Hardres 185 456
Rogers *v.* The Amado, Newberry 400 . . . . . 1980, 2010
Rolla, The, 6 C. Rob. 364 . . . . . 993, 1970
Rosalie and Betty, The, 2 C. Rob. 343 1849
Rose *v.* Himely, 4 Cranch 241 . . . . . 337, 1054, 1395, 1441, 1851
Rosalie, The, 4 C. Rob. note to table of cases 1358
Rover, The, 2 Gallison 240 1395

St. Antonius, The, 1 Acton 113 1535
St. Ivan, The, Edwards 376 2061
St. Jago de Cuba, The, 9 Wheat. 409 1792
St. Joze Indiano, The, 1 Wheat. 208 2040
St. Nicholas, The, 1 Wheat. 417 . . . . . 994, 1359
Sally, The, 8 Cranch 382 . . . . . 1376, 1442, 1699, 2007
Sally Magee, The, 3 Wall. 451 . . . . . 2020, 2034, 2035
Sampson, The, case before the Lords 793
Samuel, The, 1 Wheat. 9 1658
Sancta Trinita, The, Bonnemant's trans. of Abreu y Bartodano, tom. i, p. 117 1018
San Jose Indiano and Cargo, The, 2 Gallison 268 . . . . . 1546, 2027
Santa Cruz, The, 1 C. Rob. 50. . . . . 161, 982, 984
Santissima Trinidad, The, 7 Wheat. 283 . . . . . 1438, 1793, 1835, 2097, 2098
Sarah, The, 3 C. Rob. 330 1982
Sarah Christina, The, 1 C. Rob. 237. 1585
Scotia, The, 14 Wall. 170 1946
Sea Witch, The, 6 Wall. 242 1801
Sechs Geschwistern, The, 4 C. Rob. 100 2013
Secretary of State in Council of India *v.* Kamachee Boye Sahaba, 13 Moore's P. C. 22 2074
Sedam *v.* Williams, 4 McLean 51 1832
Selma, The, 1 Lowell 30 2052
Sessions *v.* Johnson, 95 U. S. 347 . . . . . 1830, 1831
Several Dutch Schuyts, 6 C. Rob. 48 2002
Shaw *v.* Railroad Company, 101 U. S. 557 2022
Ships taken at Genoa, 4 C. Rob. 388 1495
Siren, The, 7 Wall. 152 . . . . . 1809, 1852
Siren, The, 13 Wall. 389 . . . . . 1840, 1860, 2046, 2056, 2058
Sir William Peel, The, 5 Wall. 517 . . . . . 1771, 1835, 1848, 1883, 1955
Six Hundred and Eighty Pieces of Merchandise, 2 Sprague 233 2057
S. L. Davis, The, 6 Blatchford 138 1793
Slocum *v.* Mayberry, 2 Wheat. 1 1862
Smart *v.* Wolff, 3 Term Reports 323 . . . . . 793, 1827
Smith *v.* Black, 9 Sergeant and Rawle 142 1831
Smith *v.* Delaware Ins. Co., 3 Sergeant and Rawle 74 1356
Snelle Zeylder, The, 3 C. Rob. 21 note 574
Soglasie, The, Spinks' Prize Cases 104; 2 Spinks 101 . . . . . 1849, 2014
Sperry *v.* Delaware Ins. Co., 2 Washington C. C. 243 1973
Spes, The, 5 C. Rob. 76 1973
Sprigg *v.* Bank of Mount Pleasant, 14 Pet. 201 1830
Springbok, The, 5 Wall. 1 . . . . . 1882, 1883, 1898, 1904
Staadt Embden, The, 1 C. Rob. 26 870
Statira, The, 2 Pistoye et Duverdy 121 . . . . . 228, 930

PAGE

Steamboat Co. *v.* Chase, 16 Wall. 522 1828
Stert, The, 4 C. Rob. 65 . . . . . 994, 1648
Stover, *In re*, 1 Curtis 201 1828
Straker *v.* Hartland, 2 Hemming and Miller 570 2076
Stratton *v.* Jarvis, 8 Pet. 4 . . . . . 1724, 1923
Success, The, 1 Dodson 131 1723
Supervisors *v.* Kennicott, 94 U. S. 498 1860
Susa, The, 2 C. Rob. 251 1940
Swallow, The, 1 Swabey 30 1789
Swan *v.* U. S., 19 Court Claims 51 2052
Sybil, The, Blatchford Pr. Cas. 615 2075

Talbot *v.* Jansen, 3 Dall. 133 . . . . 148, 461, 858 860, 862, 1055, 1058
Talbot *v.* Seeman [Circuit Court] 158, 165
Talbot *v.* Seeman, 1 Cranch 1 . . . . . 207, 218, 241, 2002, 2003
Temiscouata, The, 2 Spinks 208 1827
Teresita, The, 5 Wall. 180 1885
Thales, The, 10 Blatchford 203 1827
Thirty Hogsheads of Sugar *v.* Boyle, 9 Cranch 191 . . . . . 1479, 1808
Thomas Gibbons, The, 8 Cranch 421 683
Thompson, The, 3 Wall. 155 1882
Thomyris, The, Edwards 17 1536
Thorshaven and its dependencies, Edwards 102 . . . . 456, 462, 1509
Tobago, The, 5 C. Rob. 218 . . 633, 2026, 2028, 2029, 2034, 2035, 2037, 2041
Towan, The, 8 Jurist 223 1823
Tracy *v.* Tuffly, 134 U. S. 206 1927
Trende Sostre, The, 6 C. Rob. 390 note 1478
Tritonia, The, 5 Notes of Cases (Eng.) 111 1823
Tucker *v.* Juhel, 1 Johnson's Reports 20 1356
Twee Gesuster, The, 2 C. Rob. 284 note 456

Underhill *v.* Hernandez, 168 U. S. 250 1935
Union, The, 4 Blatchford 90 1827
U. S. *v.* Alexander, 2 Wall. 404 . . . . . 1652, 1660, 2058, 2059
U. S. *v.* Clarke, 8 Peters 436 1788
U. S. *v.* The Gertrude, Blatchford Pr. Cas. 374 1623
U. S. *v.* Grush, 5 Mason 290 1841
U. S. *v.* The Hart, 3 Wall. 559. . . . . 1623, 1904
U. S. *v.* Healey, 160 U. S. 136 1927
U. S. *v.* The Little Charles, 1 Brockenbrough 347. 1402
U. S. *v.* Macdaniel, 7 Pet. 1 1789
U. S. *v.* The Malek Adhel, 2 How. 210 . . . . . 1402, 1790
U. S. *v.* Palmer, 3 Wheat. 610 . . . 1053, 1066, 1073, 1083, 1458, 1763
U. S. *v.* Peters, 3 Dall. 121 . . . . . 1055, 1057, 1205
U. S. *v.* Rider, 163 U. S. 132 1926
U. S. *v.* Ringgold, 8 Pet. 150 1788
U. S. *v.* Ross, 1 Gallison 624 2056
U. S. *v.* Sanges, 144 U. S. 310 1926
U. S. *v.* Steever, 113 U. S. 747 2052
U. S. *v.* 269½ Bales of Cotton, Woolworth 236 2057
U. S. *v.* Tynen, 11 Wall. 88 1927
U. S. *v.* Weed, 5 Wall. 62 . . . . . 1766, 1794, 1805
U. S. *v.* Wilder, 3 Sumner 308 . . . . . 1792, 1793

Venice, The, 2 Wall. 258. . . . . 1480, 1515, 1522, 1652
Venus, The, 8 Cranch 253 . . . . . 601, 619, 821, 848, 1374, 1721
Venus, The, 5 Wheat. 127 1882
Vigilantia, The, 1 C. Rob. 1 . . . . . 565, 1721
Virgo, The, 13 Blatchford 255 1827
Viveash *v.* Becker, 3 Maule and Selwyn 284 1017
Vreede Scholtys, The, 5 C. Rob. 5 note 507
Vrow Anna Catharina, The, 5 C. Rob. 161 . . . . . 700, 1771

PAGE

Vrow Elizabeth The, 5 C. Rob. 2 . . . . . 507, 1723
Vrouw Judith, The 1 C. Rob. 150 . . . . . 993, 1402, 1972

Walsingham Packet, The, 2 C. Rob. 77 . . . . . 456, 459, 1849
Wanata, The, 95 U. S. 600 . . . . . 1823, 1827, 1828
Ward *v.* Johnson, 13 Mass. 148 1831
Ware *v.* Hylton, 3 Dall. 199 465
Wasser Hundt, The, 1 Dodson 270 note 994
Webb, The, 14 Wall. 406 1823
White Squall, The, 4 Blatchford 103 1827
Whitehill's Case, cited in 5 C. Rob. 60 . . . . . 555, 575
Wiggins *v.* U. S., 3 Court Claims 412 2074
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INTRODUCTION

THE Federal Convention met in Philadelphia on May 25, 1787, and adjourned on September 17 with the Constitution of these United States to its credit. It was composed of representatives appointed by twelve of the thirteen sovereign, free, independent, original States. These deputies, as they were called, acted under instructions of their States, and the Constitution when framed was submitted to a convention held in each of the thirteen States and elected by the people thereof to consider and adopt it. The Constitution thus became the Constitution of the United States and of each State adopting it for the purposes expressed within the federal document. By its terms the Federal was to be superior to the State constitution.

The Federal Convention had been called to revise the Articles of Confederation which had proved ineffective in practice. The deputies, however, laid the Articles aside. They divided the powers of sovereignty. They made a grant of the general powers of government to the more perfect Union which they were about to create as the agent of the States. They reserved to the States the local powers which they believed could best be exercised by them to the advantage of their respective peoples. In the general interest they renounced the exercise of some powers which they would otherwise have exercised. 'The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.'[1] The Government of the Union was to consist of a legislative, an executive, and a judicial branch.

Among the eighteen heads into which they divided the legislative power of the legislature called the Congress, consisting of the Senate representing the States, and the House of Representatives the people within each of the States, that body is specifically authorized--

> To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;
>
> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; . . .

A court of the States was established under the name of the Supreme Court, in which the judicial power of the United States was vested, and Congress was authorized from time to time to ordain and establish inferior courts. Judicial power was extended 'to all Cases of admiralty and maritime Jurisdiction'. The Supreme Court was vested with the original jurisdiction specified in Article III, and in all other cases to which the judicial power extended the Supreme Court was to have 'appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such regulations as the Congress shall make'.

The Supreme Court and inferior courts were constituted by the Judiciary Act of 1789. The famous case of *The Sloop Betsey* (3 Dallas, 6), decided in

[1] Mr. Chief Justice Chase, in delivering the opinion of the Supreme Court of the United States in *Texas* v. *White* (7 Wallace, 700, 725), decided in 1868.

1794, held that the district courts of the United States were courts of prize without being specifically constituted as such. From this date the inferior courts of the United States have passed upon questions of prize in first instance and, in appropriate cases, the Supreme Court in final instance. In every one of the forty-eight States of which the more perfect Union is at present composed there is a federal court which, if a case properly arise, may exercise prize jurisdiction, with one Supreme Court of the forty-eight States to decide in final resort. So far, therefore, as the law of prize is concerned, there are many federal courts which may exercise jurisdiction, but there is one Supreme Court of prize, the Supreme Court of these United States.[1]

The necessity of prize procedure was evident from the beginning of the Revolution, indeed before the Declaration of Independence, and the experience had in the matter of prizes forced Congress, somewhat reluctantly, to exercise the power of appointing a court for this purpose before the Articles of Confederation had been adopted by the last of the States on March 1, 1781, thus investing the Congress with the power legally so to do. It was inevitable that enterprising merchantmen of the different States would waylay British commerce upon the high seas, and it was clear to discerning minds that vessels belonging to different States and commanded by citizens thereof would fall out among themselves as to the shares of the prize to which they thought themselves entitled, involve the States in controversies and, by lawless conduct, draw the United States into controversy, perhaps into conflict, with foreign States.

The Revolution broke out in Massachusetts. It was therefore in Massachusetts that the first prize court was established. In June, 1775, Elbridge Gerry, then beginning a long and distinguished political career, moved the Provincial Congress of that Colony to encourage the fitting out of armed vessels and to establish a court for the trial and condemnation of prizes. On November 10, 1775, an act was passed which has been stated to be ' the first actual avowal of offensive hostilities against the mother country, which is to be found in the annals of the revolution ',[2] and which John Adams, then at the bar when not upon the hustings, considered to be one of the ' boldest, most dangerous, and most important measures and epochas in the history of the new world, the commencement of an independent national establishment of a new maritime and naval military power '.[3] General Washington, then in command of the Continental army in and about Boston, which he had besieged and hemmed in, recognized the importance of this action. He also felt the necessity of uniform regulations and practice to prevent the States from quarrelling among themselves, to secure uniformity of decision in matters of prize, which was in the interest alike of the States and of the United States in their relations with foreign countries. Therefore, on November 11, 1775, the day

[1] The remainder of the Introduction is taken from *The United States of America : A Study in International Organization* (New York, 1920), pp. 215 *et seq.* This account is based upon an article entitled *Federal Courts Prior to the Adoption of the Constitution*, by the Honourable J. C. Bancroft Davis, Reporter to the Supreme Court of the United States (131 U.S., *App.*, xix-lxiii), and *The Predecessor of the Supreme Court*, by Professor J. Franklin Jameson, in the volume entitled *Essays in the Constitutional History of the United States in the Formative Period, 1775–1789* (1889), pp. 1–45. Where not directly quoted, the texts of these remarkable essays have been paraphrased.

[2] James T. Austin, *The Life of Elbridge Gerry*, 1828, vol. 1, p. 94.

[3] *Ibid.*, p. 96.

after the passage of the Massachusetts act, he thus wrote to John Hancock, President of the Continental Congress :

> Enclosed you have a copy of an act passed this session, by the honorable Council and House of Representatives of this province. It respects such captures as may be made by vessels fitted out by the province, or by individuals thereof. As the armed vessels, fitted out at the Continental expense, do not come under this law, I would have it submitted to the consideration of Congress, to point out a more summary way of proceeding, to determine the property and mode of condemnation of such prizes as have been or hereafter may be made, than is specified in this act.
>
> Should not a court be established by authority of Congress, to take cognizance of prizes made by the Continental vessels ? Whatever the mode is, which they are pleased to adopt, there is an absolute necessity of its being speedily determined on.[1]

Fearing that Congress had not taken action, he again wrote to its President on December 4 of the same year :

> It is some time since I recommended to the Congress, that they would institute a court for the trial of prizes made by the Continental armed vessels, which I hope they have ere now taken into their consideration ; otherwise I should again take the liberty of urging it in the most pressing manner.[2]

And, as showing the importance which the General rightly attached to this matter, a further quotation may be made from a letter addressed to his fellow-Virginian, Richard Henry Lee, who, a few months later, on June 7, 1776, was to move the momentous resolutions in Congress ' that these United Colonies are and of right ought to be free and independent States '.[3] Thus, on December 26, he wrote to Mr. Lee :

> . . . I must beg of you, my good Sir, to use your influence in having a court of admiralty, of some power appointed to hear and determine all matters relative to captures ; you cannot conceive how I am plagued on this head, and how impossible it is for me to hear and determine upon matters of this sort, when the facts, perhaps, are only to be ascertained at ports forty, fifty, or more miles distant, without bringing the parties here at great trouble and expense. At any rate, my time will not allow me to be a competent judge of this business.[4]

The Congress, however, had not been remiss, and immediately upon the receipt of General Washington's first letter it took action. On November 17 it was ' *Resolved*, That a committee be appointed to take into consideration so much of said letter as relates to the disposal of such vessels and cargoes belonging to the enemy, as shall fall into the hands of, or be taken by, the inhabitants of the United Colonies '.[5] On November 23 the committee to which the letter was referred brought in its report. It was ordered to lie upon the table ' for the perusal of the members ' ; it was ' debated by paragraphs ' on the 24th and 25th of the same month, and adopted on November 25, 1775.[6] The resolutions authorized the capture of prizes upon the high seas and legalized

[1] Ford, *Writings of George Washington*, vol. III, p. 213 ; Sparks, vol. III, pp. 154–5.
[2] Ford, *ibid.*, p. 257 ; Sparks, p. 184.
[3] *Journals of the Continental Congress*, vol. V, p. 425.
[4] Ford, *Writings of George Washington*, vol. III, p. 274 ; Sparks, vol. III, p. 217.
[5] *Journals of the Continental Congress*, vol. III, pp. 357–8.
[6] *Ibid.*, pp. 371–5.

those which had already been made. They determined the shares of the captors in the prize and the distribution of the money. They provided, as later in the case of piracies and felonies committed on the high seas, that the trial should take place in the colonial courts (because at this time the Declaration of Independence had not been proclaimed), and that an appeal should lie to the Congress.

The passage of this resolution was pleasing to ' the General ', and, with a clearness of vision and a tenacity of purpose, recognized by his countrymen and with which a grateful posterity credits him, he pointed out the one thing needed to perfect the action of Congress in a passage from a letter to its president, dated December 14, 1775 :

> The resolves relative to captures made by Continental armed vessels only want a court established for trial, to make them complete. This, I hope, will be soon done, as I have taken the liberty to urge it often to the Congress.[1]

In the end, the Congress was forced to take the action which the far-sighted Washington had recommended in the beginning ; but it was only taken after great hesitation, with much reluctance, and when a very bitter experience had convinced its members of the absolute necessity of a court.

Before stating this incident, it should be mentioned that an Admiralty Court, generally requiring trial by jury, was organized in each of the colonies or States in accordance with the recommendation of the Congress that this be done, as it will be observed that Congress contented itself for the present with an appeal from the local jurisdictions, which were regarded as courts of first instance in prize matters. The intent of Congress seems to have been misunderstood, as on January 31 and February 27, 1776, two cases which had not been passed upon by the colonial courts were referred direct to the Congress by the petitioners, and in each case, in accordance with its understanding of its resolutions, the Congress referred the applicants to the colonial courts. However, a few weeks later (April 4, 1776), the Congress took original jurisdiction in the matter of a prize vessel which had been run ashore,[2] directed that it be sold, and decreed the distribution of the proceeds arising from the sale. This appears, however, to have been the only instance in which the Congress took original jurisdiction. Therefore, it only acted in cases of appeal, at first directly, shortly thereafter through committees, and finally by means of an appellate court established in accordance with General Washington's recommendation.

The first case of appeal was that of the schooner *Thistle*,[3] which was laid before Congress on August 5, 1776, a month after the Declaration of Independence. Congress attempted to hear the appeal as a body but eventually referred it to a special committee, and the earlier cases were referred to special committees until, in the beginning of 1777, Congress felt the necessity of and therefore created a standing committee on appeals, to consider such cases as should be laid before it in accordance with its resolution of November 25, 1775. This important action was taken on January 30, 1777, when it was ' *Resolved*, That a standing committee to consist of five members, be appointed to hear and determine upon appeals brought against sentences passed on libels

[1] Ford, *Writings of George Washington*, vol. III, p. 274 ; Sparks, vol. III, pp. 196–7.
[2] *Journals of the Continental Congress*, vol. IV, p. 256. [3] *Ibid.*, vol. V, p. 631.

in the courts of Admiralty in the respective states, agreeable to the resolutions of Congress; and that the several appeals, when lodged with the secretary, be by him delivered to them for their final determination'.[1] The members of the committee were frequently changed, but the method was continued until a court was established. The defects of a changing personnel, even although forming a permanent committee, were pointed out by the merchants and citizens of Philadelphia, with the approval of the Pennsylvanian authorities, in the petition to Congress of May, 1779.

The case of the *Active* called attention to another great defect of the existing system, because, although a State decree was reversed by the committee on appeal, the State court did not feel itself obliged to give effect to the reversal of its judgement and to recognize by proper action the rights of property acquired under federal appeal.

The facts of this case are very interesting, and should be stated in this connexion, as it was one of the cases which led to the organization of a court of appeal, and, indirectly, to the establishment of the Supreme Court itself. One Gideon Olmstead and three other citizens of Connecticut were captured by the British and carried to Jamaica, where they were put on board the sloop *Active*, laden with a cargo of supplies for New York, then in possession of the British. They were obliged to assist in its navigation, which they were unwilling to do. They therefore rose against the master and crew, took possession of the sloop, and made for the port of Egg Harbour, in New Jersey; but, before reaching this port, the *Active*, under their control, was captured by one Houston, in command of the Pennsylvanian armed brig *Convention*. The *Active* was taken into the port of Philadelphia and libelled as prize of the *Convention*. The case was further complicated by the fact that the officers of a privateer, cruising in company with the *Convention*, claimed to have taken part in the capture, and therefore made claim to a part of the proceeds. Olmstead and his companions, claiming the sloop *Active*, of which they were in control when taken, put in a claim to the whole of the proceeds. In the admiralty court of Pennsylvania a trial was had by jury, the verdict of which was as follows:

> One-fourth of the net proceeds of the sloop *Active* and her cargo to the first claimants, three-fourths of the net proceeds of the said sloop and her cargo to the libellant and the second claimant, as per agreement between them.[2]

Judgement was entered upon the verdict, from which an appeal was taken by Olmstead and others to the Congressional committee of appeal. On December 15, 1778, the commissioners reversed the decision of the State court and rendered judgement in favour of Olmstead and others, directing the court below to sell the sloop and cargo and to pay the remainder to the appellants after deducting costs, charges, and expenses. The judge of the Pennsylvania Court of Admiralty recognized the validity of the decision reversing the decree of his court, but, insisting that he could not set aside the verdict of the jury, issued an order that the sloop and cargo be sold and the proceeds brought into court. On December 28, 1778, the appellants moved the committee that process might issue to the Admiralty Court of Pennsylvania commanding the marshal to execute the decree of the committee. The committee accordingly directed the marshal to hold the money subject to their order, but he disregarded this order

[1] *Journals of the Continental Congress*, vol. VII, p. 75. [2] *Ibid.*, vol. XIII, p. 282.

and paid the money to the Admiralty Judge; whereupon the committee declared that 'this Court, being unwilling to enter into any proceedings for Contempt, lest Consequences might ensue at this Juncture dangerous to the public Peace of the United States, will not proceed farther in this affair, nor hear any Appeal, until the Authority of this Court shall be so settled as to give full Efficacy to their Decrees and Process'.[1] At the same time the committee laid the proceedings before Congress, which approved their action in an elaborate series of resolutions, which are so important, because of their larger bearing upon the relation of the States, or indeed of any nation to foreign countries, that they are quoted in full:

> *Resolved*, That Congress, or such person or persons as they appoint to hear and determine appeals from the courts of admiralty, have necessarily the power to examine as well into decisions on facts as decisions on the law, and to decree finally thereon, and that no finding of a jury in any court of admiralty, or court for determining the legality of captures on the high seas can or ought to destroy the right of appeal and the re-examination of the facts reserved to Congress:
>
> That no act of any one State can or ought to destroy the right of appeals to Congress in the sense above declared:
>
> That Congress is by these United States invested with the supreme sovereign power of war and peace:
>
> That the power of executing the law of nations is essential to the sovereign supreme power of war and peace:
>
> That the legality of all captures on the high seas must be determined by the law of nations:
>
> That the authority ultimately and finally to decide on all matters and questions touching the law of nations, does reside and is vested in the sovereign supreme power of war and peace:
>
> That a controul by appeal is necessary, in order to compel a just and uniform execution of the law of nations:
>
> That the said controul must extend as well over the decisions of juries as judges in courts for determining the legality of captures on the sea; otherwise the juries would be possessed of the ultimate supreme power of executing the law of nations in all cases of captures, and might at any time exercise the same in such manner as to prevent a possibility of being controuled; a construction which involves many inconveniences and absurdities, destroys an essential part of the power of war and peace entrusted to Congress, and would disable the Congress of the United States from giving satisfaction to foreign nations complaining of a violation of neutralities, of treaties or other breaches of the law of nations, and would enable a jury in any one State to involve the United States in hostilities; a construction which for these and many other reasons is inadmissible:
>
> That this power of controuling by appeal the several admiralty jurisdictions of the states, has hitherto been exercised by Congress by the medium of a committee of their own members:
>
> *Resolved*, That the committee before whom was determined the appeal from the court of admiralty for the State of Pensylvania, in the case of the sloop *Active*, was duly constituted and authorized to determine the same.[2]

The legislature of Pennsylvania, on March 8, 1780, repealed the statute authorizing juries to decide admiralty cases, but the case of the *Active* was not settled during the period of the Confederation, nor indeed for many years

[1] Jameson, *Essays*, p. 20.

[2] *Journals of the Continental Congress*, vol. XIII, pp. 283–4. Session of March 6, 1779.

after its demise. The moneys had been deposited with one David Rittenhouse, the distinguished astronomer, at that time treasurer of the State, after whose death Olmstead and others sued his executrices for them in 1802 in the United States district court for Pennsylvania. Judge Peters decreed for the plaintiffs; but the legislature of Pennsylvania, apparently desirous of keeping the money within their jurisdiction, passed an act directing its attorney general to sue the executrices for the money and directing the governor to protect them from federal process. In 1809 the case came before the Supreme Court of the United States,[1] which had superseded the committee of appeals of the Confederation, and before Chief Justice Marshall, who sat in the seat of the commissioners, where the decision of the committee was finally affirmed, and execution of the judgement of the district court decreed.

The moral of the *Active* was not lost upon the Congress, nor did the petition of the Philadelphian merchants and citizens fall upon deaf ears. On May 22, 1779, the very day on which the petition had been read, a resolution was introduced, recommending 'that each state pass an act empowering Congress, in advance of the ratification of the Articles of Confederation, to erect a permanent court of appeals; but the resolution does not appear to have passed', for the reason, suggested by Professor Jameson, from whom the above passage is quoted, that 'probably Congress felt that they would be taking a stronger position if they assumed the existence of such power, as derived from their "supreme sovereign power of war and peace", in much the same way as the power to hear such appeals by committee of Congress had been; probably also it despaired of securing such action on the part of all thirteen of the states'.[2]

But indeed, even earlier, the advisability of a court had been agitated, for on August 5, 1777, it was '*Resolved*, That Thursday next be assigned to take into consideration the propriety of establishing the Court of Appeals'. Thursday came, but the court did not. The matter was postponed. In December of 1779, following the Philadelphian petition, an ordinance was drafted for a permanent court. As amended, it was passed on January 15, 1780, in the following form, a year in advance of the definitive adoption of the Articles of Confederation:

> *Resolved*, That a court be established for the trial of all appeals from the Courts of Admiralty in these United States, in cases of capture, to consist of three judges appointed and commissioned by Congress, either two of whom, in the absence of the other, to hold the said court for the despatch of business; that the said court appoint their own register; that the trials therein be according to the usage of nations, and not by jury.[3]

The act of January 15, 1780, creating the court, did not provide for the transfer to it of the cases pending before the committee. On May 9 the case of *Bragg* v. *The Sloop Dove*[4] was brought on appeal before Congress. It was referred to the new court and on May 24 Congress resolved 'that the stile of the Court of Appeals appointed by Congress be "the Court of Appeals in cases of capture"; that appeals from the Courts of Admiralty in the respective States be, as heretofore, demanded within five days after definitive sentence,

[1] See *The United States* v. *Judge Peters*, 5 Cranch, 115.
[2] Jameson, *Essays*, p. 27.
[3] 131 U. S., *App.*, p. xxv.
[4] *Ibid.*, p. xliv.

and in future such appeals be lodged with the register of the Court of Appeals in cases of capture within forty days thereafter ' ; and ' that all matters respecting Appeals in cases of capture now depending before Congress, or the Commissioners of Appeals, be referred to the newly erected Court of Appeals, to be there adjudged and determined according to law ; and that all papers touching appeals in cases of capture lodged in the office of the Secretary of Congress, be delivered to and lodged with the register of the Court of Appeals '.[1] Thus the first permanent tribunal of these United States was established.

Mr. Davis, whose article entitled *The Federal Courts Prior to the Adoption of the Constitution* has largely served as the basis for the above remarks, gives the following analysis of the work of the committees and of the court of appeals :

> Sixty-four cases in all were submitted to the committees of Congress, of which forty-nine were decided by them, four seem to have disappeared, and eleven went over to the Court of Appeals for decision. Fifty-six cases in all, including the eleven which went over, were submitted to the Court of Appeals, and all were disposed of. Appeals were heard from every maritime State except New York. None came from that State ; doubtless because its maritime counties were occupied by the enemy from the autumn of 1776 to the end of the war.[2]

After examining the records of the committee and of the court of appeals, and enumerating the cases in which the court of appeals filed written opinions, Mr. Davis thus closes his account of the cases determined on appeal by the Congress, its permanent committee, and the federal Court of Appeals :

> They were properly placed in the volumes which contain the commencement of the series of Reports of the Supreme Court of the United States ; for the court from which they proceeded was in its day the highest court in the country, and the only appellate tribunal with jurisdiction over the whole United States.[3]

As to the influence of the Court of Appeals, which went out of existence two days after the meeting of the memorable Convention, which, as Professor Jameson says, ' provided the United States with a more comprehensive and more effective judiciary ', and its importance in the development of a permanent judiciary, Professor Jameson writes :

> However this may be, it cannot be doubted that the Court of Appeals, though, as remarked by counsel in Jennings v. Carson, ' unpopular in those states which were attached to trial by jury ', had an educative influence in bringing the people of the United States to consent to the establishment of such a successor. It could hardly be that one hundred and eighteen cases, though all in one restricted branch of judicature, should be brought by appeal from state courts to a federal tribunal, without familiarizing the public mind with the complete idea of a superior judicature, in federal matters, exercised by federal courts. The Court of Appeals in Cases of Capture may therefore be justly regarded, not simply as the predecessor, but as one of the origins, of the Supreme Court of the United States.[4]

[1] 131 U. S., *App.*, p. xxvi.
[2] *Ibid.*, p. xxxiv.
[3] *Ibid.*, p. xxxv.
[4] Jameson, *Essays*, pp. 43–4.

PRIZE CASES DECIDED IN THE UNITED STATES SUPREME COURT, 1789–1918

Glass, et al. Appellants, v. The Sloop Betsey, et al.

(3 Dallas, 6) 1794.

Captain *Pierre Arcade Johannene,* the commander of a French privateer, called the *Citizen Genet,* having captured *as prize,* on the high seas, the sloop *Betsey,* sent the vessel into *Baltimore* ; but upon her arrival there, the owners of the sloop and her cargo filed a libel in the District Court of *Maryland,* claiming restitution, because the vessel belonged to subjects of the king of Sweden, a neutral power, and the cargo was owned, jointly by Swedes and Americans. The captor filed a plea to the jurisdiction of the court, which, after argument, was allowed ; the Circuit Court affirmed the decree ; and, thereupon, the present appeal was instituted.

The general question was—Whether under the circumstances of this case, an American Court of Admiralty, has jurisdiction to entertain the complaint, or libel, of the owners, and to decree restitution of the property? It was argued by *E. Tilghman* and *Lewis,* for the appellants ; and by *Winchester* (of *Maryland*) and *Du Ponceau,* for the appellee.

For *the Appellants,* the case was briefly opened, upon the following principles. The question is of great importance ; and extends to the whole judicial authority of the United States ; for, if the admiralty has no jurisdiction, there can be no jurisdiction in any common law court. Nor is it material to distinguish the ownership of the vessel and cargo ; since strangers, or aliens, in amity, are entitled equally with Americans to have their property protected by the laws. *Vatt. B. 2. s.* 101, 103. *p.* 267. There can be no doubt that this is a civil cause of admiralty and maritime jurisdiction, and so within the very terms of the judicial act. Restitution, or no restitution, is the leading point ; that necessarily, indeed, involves the point of prize, or no prize, as a defence for capturing ; but if the admiralty is once fairly possessed of a cause, it has a right to try every incidental question. That the vessel is a legal prize, may be a good plea to the suit ; but it is not a good plea to the jurisdiction of the court ; and the captor by bringing his prize into an American port, has himself submitted to the American jurisdiction, which is in this instance

to be exercised by the Judicial, not the Executive, department. *Const. U.S. art.* 3. *s.* 1. *Jud. Act. s.* 9. *Doug.* 580, 84, 5. 592. 4. *Carth.* 474. 1 *Sid.* 320. 3 *T. Rep.* 344. 4 *T. Rep.* 394, 5. *Skyn.* 59. *T. Ray.* 473. *Carth.* 32. 6 *Vin. Abr.* 515. 3 *Bl. Com.* 108. 1 *Vent.* 173. 2 *Saund.* 259. 2 *Keeb.* 829. *Lev.* 25. *Sid.* 320. 4 *Inst.* 152. 154. 2 *Bulsh.* 27, 8, 9. 2 *Vern.* 592. 3 *Bl. C.* 108. 2 *L. Jenk.* 755, 727, 733, 751, 754, 755, 780. |

p. 7 For *the Appellees*, the captors (after some exceptions to the regularity of the appeal, which were waved by consent[1]) it was observed, that this is not a libel for a trespass, and so within the jurisdiction of the District Court; because a seizure *as prize*, is no trespass, though it may be wrongful. Nor can any act subsequent to the seizure for securing and bringing the prize into port, give jurisdiction, if the seizure does not. *Doug.* 571. Neither can the question be, whether the taking was so illegal as to amount to piracy; and therefore, that there ought to be restitution; for piracy can only be decided in the Circuit Court. But the question raised by the libel is *a question of prize*; and the decision of that must precede the subsequent one of *restitution*; which, so far from being the main and original question, is the *consequence* of the former. Admitting, then, the present capture to be unlawful, because it is neutral property, still the District Court has no jurisdiction of a question of prize by the constitution and laws of the United States, nor by the laws of nations.

I. The District Court has no jurisdiction by the Constitution and laws of the United States (which form the only possible source of Federal jurisdiction) for, although it is admitted, that by the 1st and 2d sections of the 3d article of the Constitution, and the Judicial act, the jurisdiction of the District Court extends to all *civil causes* of admiralty and maritime jurisdiction; yet, it is denied, that *prize* is a *civil cause* of that description; nor can the expression vest a power in the District Court to decide the legality of a prize, even by a citizen of the United States. A citizen, indeed, can only make a prize when the United States are *at war* with some foreign power; but being *at peace* with all the world, no such question can now be agitated; and, of course, no jurisdiction, in such a case, can exist in any of its courts. By comparing the act of Congress with the Constitution, it is obvious, that the former does not vest in the District Court, *the same*, or *so extensive*, a judicial power, as the latter would warrant. The Constitution embraces admiralty cases of whatever kind,—whether civil, or criminal, done in time of peace, or in time of war; but the act of Congress limits the power of the District Court to *civil*

[1] The Appeal had not been presented to any Court or Judge of the United States, but to a Notary Public of Baltimore. The Court directed, that the waver of the exception, by consent, should be entered, as they would not allow any judicial countenance to be given to the proceeding before the Notary.

causes of admiralty and maritime jurisdiction ; and the court can have no other, or greater power, than the act has given. *Civil causes* cannot possibly include captures, or the legality of a prize which can only be made *in time of war*. The words are used to denote that the causes are not to be *foreign* causes, or arising from, and determinable by, the | *jus belli* ; p. 8 but are such as relate to the community, arising in the time of peace, and are determinable by the *civil* or *municipal* law ; whereas *prize* is not a *civil* marine cause ; nor is it a subject of *civil* jurisdiction. *Doug.* 2 *Ruth. Inst.* 595. The jurisdiction of the admiralty courts of *England*, and of the United States, arises from the same words ; but it is manifest, that the latter has no other jurisdiction by law, than that which has been exercised by the *Instance* court in *England*, which is widely different from the *prize* court, though the powers are usually exercised by the *same* person. The *prize* court can only have continuance during *war*, and derives its powers from the warrant which calls it into activity. *Doug.* 613. 2 *Woodes.* 452. *Collect. Jurid.* 72. The *Instance* court derives its jurisdiction from a commission, enumerating particularly every object of judicial cognizance ; but not a word of prize ; any more than is contained in the act of Congress, when enumerating the objects of judicial cognizance in the district court. The manner of proceeding in these courts is totally different. The question of prize, or no prize, is the boundary line, and not the locality ; and the nature of that question not only excludes the *Instance*, but the *common law*, and *all other courts* ; so that whenever a cause involves the question of prize, and a determination of that question must precede the judgment, they will decline the exercise of jurisdiction and refer it to the prize court. Besides, Congress have not yet declared the rules for regulating captures on land, or water ; (*Const. art.* 1. *sec.* 8.) and if the district court is now a court of prize, it is a court *without rules, to determine what is, or what is not, lawful prize* ; for, the rules of an *Instance* court will not apply. If, upon the whole, the district court has no jurisdiction, under the act of Congress, of a case of *prize* by a citizen of the *United States*, it cannot have jurisdiction of a *prize* by a citizen of *France*, which is the question raised by the libel.

II. The District Court has no jurisdiction by the law, usage and practice of nations. The injury, if any, by the capture, is done by a citizen of *France* to the *subjects* of the King of *Sweden*, and to a citizen of the *United States* ; and the question is, whether that injury is to be redressed in any court of the *United States*, who are in peace and amity, by treaties, with *France* and *Sweden*, and who are *neutral* in the present war ? Admitting, in the first place, that *Sweden* is also at peace with France, and neutral in the war, the injury, so far, is an attack upon the sovereignty of *Sweden*, which *Sweden* alone can take cognizance of :

A neutral nation has nothing to say to a capture, or any other injury perpetrated by a citizen of *France* on the subjects of *Sweden*. 2 *Bynk.* 177.
p. 9 *Vatt. b.* 2. *s.* 54, 55. | 4 *Bl. Com.* 66. *Vatt. b.* 2. *c.* 6. 18. *p.* 144. 249. *to* 252. 2 *Ruth. Inst.* 513. 4. 5. 9 *Wood.* 435. 439. *Lee on Capt.* 45. 6, 7, 8, 2. If the government of the *United States* could not interfere, *a fortiori*, its courts of justice cannot. The same reasoning applies to the case of the *American*, whose property is alledged to be captured; his application ought to be made to his government; the injury he complains of, being of *national*, not of judicial, enquiry; and, indeed, the very case is provided for in the treaty between the *United States* and *Sweden*.[1]

Hitherto the case has been considered as it appears from the allegations in the libel; but it is proper likewise to consider the law as it arises upon the facts disclosed in the plea. This plea to the jurisdiction states formally the existence of war between *France* and *England*; the public commission of the captor; the capture of the vessel and cargo on the high seas, as *prize*, alledging the same to be the property of *British* subjects; and the bringing the prize into port, by virtue of the treaty between *America* and *France*. Upon this statement, two additional objections arise to the jurisdiction of the District Court: 1st. That by the law of nations, the courts of the captor can alone determine the question of prize, or no prize; and 2d. That the courts of *America* cannot take cognizance of the cause, without a manifest violation of the 17th article of the treaty between the *United States* and *France*.

I. The right of a belligerent power to make captures of the property of the enemy is incontestible; and to inforce that right, the law of nations subjects the ships of neutral nations to search, and, in cases of justifiable suspicion, to seizure and detention; when the event of the enquiry, if an acquital is pronounced, will furnish the criterion of damages. *Doug.* 571. By capture the thing is acquired not to the *individual*, but the *state*; and the law of nations gives, as to the external effects, a just property in movable or immovables, so acquired, whether from enemies, or offending neutrals; and no neutral power can be permitted to enquire into the *justice* of the war, or the *legality of the* capture. 2 *Wood.* 446. *Vatt. b.* 3. *s.* 202. *Lee on Cap.* 82. The great case of *the Silesia loan* is a decided authority in support of this argument. It is there expressly stated 'that prize, or no prize, can only be decided by the admiralty courts of that government to whom the captor belongs;' and, consequently, 'the erecting of foreign jurisdictions elsewhere to take cognizance thereof, is contrary to the known practice of all nations, in like cases;—a proceed-
p. 10 ing which no nation can admit.' *Collect. Jurid.* That an | *American* is a party to the suit, can make no difference; because, if the jurisdiction

[1] See the second separate article.

does not exist, it cannot be assumed, or exercised, in any case. In proof of the practice innumerable authorities may be adduced; from which, however, the following are selected: Treaty of 1699 between *Great-Britain* and *Denmark*;—of 1763, between *Great-Britain*, *France* and *Spain*;—of 1753, between *Great-Britain* and *France*;—of 1786, between the same parties; and the several treaties between the *United States*, and *Holland*, *Sweden*, and *Prussia*, respectively. *Har. Law Tracts* 466. *Lee on Capt.* 238. *Doug.* 616.

If, as already has been shewn, the District Court is not vested with any separate power as a *prize court*, neither can it on the *instance* side of its admiralty jurisdiction, take cognizance of the question of prize, upon any principle or usage heretofore received as law. The question of prize is to be determined by the *jus belli*; whereas the instance court is a court of *civil* jurisdiction, regulated by the *civil law*, the *Rhodian law*, the *laws of Oleron*, or by peculiar municipal laws and constitutions of countries, towns, or cities bordering on the sea. It is not bounded by the locality of an act; but regulates its decisions by the laws peculiar to the nation by which it is constituted, in matters happening on *the sea*, which, if they had happened on land, would have been cognizable in the common law courts. 1 *Bac. Abr.* 629. 1 *Com. Dig. tit.* '*Admiralty.*' *E.* 12. 4 *Inst.* 134. But a *tort* on the high seas being merged in the capture as *prize*, the instance court cannot have jurisdiction, unless the main question is at rest, which will never be the case, whether the libel is for restitution, or condemnation. 2 *Lev.* 25. *Carth.* 474.

It is urged, however, that the captor has by his own act, in bringing the thing seized into port, and coming *himself* within the territory of the *United States*, made it necessary to proceed in the present form. But the original act derived its quality from the intention of the seizure, which was *as prize*; and the law precludes any court from deciding on the incident, that had no jurisdiction of the original question. *The case of the Silesia loan. Coll. Jurid.* Before the bringing into port, the legality of the capture was triable only *in the prize courts of France*; the bringing into port was lawful by the law of nations; and if the *American* courts had no jurisdiction at the time of the capture, a subsequent lawful act could give none. 1 *Lev.* 243. 1 *Sid.* 367. 2 *Lev.* 25. *Carth.* 474. The cases cited by the appellant's Counsel, do not militate against this doctrine. The cases in 2 *Sand.* 259. 1 *Vent.* 175. *Sid.* 120. did not involve the question of prize; the sole controversy was, whether the taking of the vessel was piratical, or not, | and whether a subsequent sale on land p. 11
transferred the jurisdiction from the admiralty to the common law courts. The observation of Justice *Blackstone* (3 *Bl. Com.* 108.) is not supported by the authorities to which he refers; and evidently arose from inadver-

tancy, or inaccuracy, of expression. *Palaches* case, 4 *Inst.* 154. 3 *Buls.* 27. 8. 9. was founded on particular statutes, which facilitated the mode of obtaining restitution of goods *piratically seized*; the question of prize never occurred in the investigation. *Sir L. Jenkins* reports a number of cases before the *King in council*, upon captures within the limits of the government; but they do not instance the exercise of any judicial authority in effecting restitution. If the act of bringing *the thing* into the territory gives any jurisdiction, it is to the *sovereign*, not the *judicial*, power. 2 *Wood.* 439. And the captain of the *French* privateer has done *no act*, which can authorise the exercise of jurisdiction *over his person*. The rule authorising the exercise of jurisdiction over persons coming within the limits of a country, has been narrowed down, by the voluntary law of nations, to cases where there is either *a local allegiance*, or *voluntary submission*. To this source might be referred the right of a government to punish faults, and decide controversies, between *strangers*, or between *citizens* and *strangers*: but such state has no right *over the person of a stranger*, who still continues a member of his own nation. *Vatt. b.* 2. *s.* 106. 108. Local allegiance is not due from a stranger brought in *by force*, or coming *by licence*; nor, if it does exist, does it give jurisdiction over faults committed out of the country, *before a residence*. *Vatt. b.* 4. *s.* 92. The captors, in the present case, came hither, by licence, under the sanction of a treaty; and, therefore, it cannot be presumed, that they intended to submit to the municipal authority; unless the presumption arises from the treaty: It does not so arise from affirmative words; and any implication is rebutted by the provision of the treaty, that they shall be at full liberty to depart. But, on the other hand, the principle on which depends the right of the country of the captors to decide, whether the property captured is lawful prize, is, briefly, *because the captors are members of that country, and because it is answerable to all other states for what they do in war*. 2 *Ruth. Inst.* 594.

II. The interference of the American courts will be a manifest violation of the 17th article of the treaty with France. The terms of the treaty are clear and explicit, that the validity of prizes shall not be questioned; and that they may come into, and go out of, the *American ports at pleasure*. To decide in opposition to a compact, so unequivocal and un-
p. 12 ambiguous, | would endanger the national tranquility, by giving a just and honorable cause of war to the *French Republic*.

For the Appellants, in reply. The arguments of the opposite counsel, present three objects for investigation: 1st. Whether the treaty between *France* and the *United States*, prevents any arrest of the vessel and cargo, under the authority of our government? 2d. Whether the District Court is a prize court? and 3d. Whether, even if it is a prize court, the remedy,

in the present case, ought not to be sought through the executive, instead of the judicial, department ?

I. The 17th article of the Treaty expressly extends only to ' ships and goods taken by *France* from *her enemies* ; ' and being in the affirmative, as to enemies, it affords a strong implication of a negative as to neutrals and *Americans*. If, indeed, the citizens of *France* may keep *a neutral*, as a prize taken from *their enemies*, they may likewise, any where abroad seize *American* property and *American* citizens in vessels, and our government cannot interfere, even in our own ports, to prevent their being carried away ; since, according to the opposite construction, the article prevents any interference in any case. The words, however, are directly against that construction ; and even were it otherwise, the absurdity and injustice of the consequences which flow from it, would demand a different construction. *Vatt. b. s. p.* 369. *Grot. s. 22. p.* 365. *Puff.* 544. *s.* 19. *p.* 1. *Grot.* 358. *s.* 12. *p.* 2. *Vatt. b. s.* 282. *p.* 380. 381. The sense must be limited, as the subject of the compact requires ; and when a case arises, in which it would be too prejudicial to take a law according to the rigor of the terms, a restrictive interpretation should be used. *Vatt. b. s.* 292. *p.* 391. *Grot. s.* 27. *p.* 361. *Vatt. b. s.* 295. *p.* 392.

II. It is admitted that the Constitution gives to Congress, the power of vesting a prize jurisdiction in the Federal Courts ; but, it is urged, that this power has not been exercised, because ' all civil causes of admiralty and maritime jurisdiction,' which are the terms of the investment, do not include prize causes. In examining the judicial act, however, to discover the intention of the legislature, it is plain that *civil* is used, upon this occasion, in contra-distinction to *criminal*. In other parts of the act, the word ' civil ' is dropped ; (*sec.* 12. 13. 19. 21. and in the 30th section a provision is made expressly for a case of *capture*. The truth is, *Admiralty* is the *genus*, *instance* and *prize* courts are *the species*, comprehended in the grant of admiralty jurisdiction. *Doug.* 580. 579. 582. 583. 594. 1 *Sid.* 367. 3 *T. Rep.* 323. 1 *Dall. Rep.* 105. 6. Lord *Mansfield* does, indeed, say, that *prize* is not a civil and maritime cause, *Doug.* 592 ; but he, also says, that, it is a cause of admiralty jurisdiction. It is urged, that prizes can only be made in time of | war ; but it is sufficient to observe, in answer, p. 13
that, however just the abstract proposition may be, it is equally clear, that prize courts may proceed in time of peace, for what was done in time of war. *Doug.* 583. *Carth.* 474. 4 *Inst.* 154. *Buls.* 13. 1 *Lev.* 243. *Hume's Hist. of Eng. vol.* 7. *p.* 431. 2 *Saund.* 259. 2 *Lev.* 25. It is further urged, that the power of declaring war, and making rules respecting captures, is vested in Congress ; and that Congress has made no such rules ; but, surely, whether the rules were made, or not, (and they are proper to be established for a division of captures,) the property of an

enemy, in case of a war, would be lawful prize. Those rules can have nothing to do with creating a jurisdiction. Nor is it available to say, that this question results from war, and, therefore, is not of civil jurisdiction: for, taking the word *civil* as opposed to the word *criminal*, the consequence does not follow; and the distinction appears in 4 *Inst.* where the property was libelled *civiliter*, after an ineffectual attempt *criminaliter*.

III. In Europe, the *Executive* is almost synonymous with the *Sovereign* power of a State; and, generally, includes legislative and judicial authority. When, therefore, writers speak of the sovereign, it is not necessarily in exclusion of the judiciary; and it will often be found, that when the Executive affords a remedy for any wrong, it is nothing more than by an exercise of its judicial authority. Such is the condition of power in that quarter of the world, where it is too commonly acquired by *force*, or *fraud*, or both, and seldom by *compact*. In *America*, however, the case is widely different. Our government is founded upon compact. Sovereignty was, and is, in the people. It was entrusted by them, as far as was necessary for the purpose of forming a good government, to the Federal Convention; and the Convention executed their trust, by effectually separating the Legislative, Judicial, and Executive powers; which, in the contemplation of our Constitution, are each a branch of the sovereignty. The well-being of the whole depends upon keeping each department within its limits. In the State government, several instances have occurred where a legislative act, has been rendered inoperative by a judicial decision, that it was unconstitutional; and even under the Federal government the judges, for the same reason, have refused to execute an act of Congress.[1] When, in short, either branch of the government usurps that part of the sovereignty, which the Constitution assigns to another branch, liberty ends, and tyranny commences. The Constitution designates the portion of sovereignty to be exercised by the
p. 14 Judicial department; | and, among other attributes, devolves upon it the cognizance of 'all cases of admiralty and maritime jurisdiction'; and renders it *sovereign*, as to determinations upon property, whenever the property is within its reach. Those determinations must be co-extensive with the objects of Judicial sovereignty; which, according to the nature of the objects, will be regulated by common law, by statute law, and by the law of nature and nations. It is competent to execute its decrees; and can, if necessary, raise the *Posse Civitatis*. To the Judicial, and not to the Executive, department, the citizen, or subject, naturally looks for determinations upon his property; and that agreeably to known rules, and settled forms, to which no other security is equal. Why, then, recur to the executive, when the property, in the present instance, is on the

[1] See *Hayburn's* Case, 2 Dallas, 409.

spot, and in the hands of the judicial officers? By what rules is the executive to judge? What forms shall it adopt? And to what tribunal shall we appeal from an erroneous sentence? Will it not be *novi judicii, nova forma?* As in *Milo's* case, the eye of the lawyer will, in vain, look for *veterum consuetudinem fori, et pristinum morem judiciorum.* But can the executive give complete redress by assessing damages; or accomplish equal and final justice, by ascertaining the rights of different claimants? Will the injured have its assistance, *of course and of right*, or as it may please the officers of State? And shall even American citizens be detained prisoners in our own harbours, depending for their liberty upon the will of a secretary of state? It will not be pretended, as the foundation for such a doctrine, that the executive is more independent, and less liable to corruption, than the Judicial power: And where shall be the boundary to executive interferences in questions of property, if it is admitted in the present case, which is merely a question of that description?

If the property were to be removed from, or if it had never been brought within, the reach of the judicial authority, and it should be divested by an unjust sentence abroad, then the citizen must, of necessity, avail himself of the executive authority, through the medium of negociation, or reprisal. 1 *Bl. Com.* 258. 2 *Ruth. Inst.* 513, 4. 5. *Lee.* 46. 6. *Sir T. Ray.* 473. But, when the property is here, it is incumbent on the opposite party to show, that the general jurisdiction of courts, which applies, *prima facie*, to every thing within their reach, does not apply in the particular case of the property of one neutral power captured, and brought into the ports of another neutral power. In the cases cited from *Lee* 204. *Coll. Jur.* 135, 137, 153, there had been regular proceedings in *England*, which the king of *Prussia* attempted to undo, by erecting a court of his own to revise them. *Lee.* 238, 9. And the obligation of the treaties that | have been referred to, can only affect the parties; as they are p. 15
matter of positive agreement.

But even in *England*, the judicial power, possesses the jurisdiction, which is asserted to belong to the judicial power of the United States. The question is restitution, or no restitution, involving the question of prize, or no prize, brought forward by the captured, and not by the captor. The question of prize or no prize, is emphatically of admiralty jurisdiction, exclusively of the common law; and must be determined agreeably to the law of nations. *Doug.* 580, 4, 5. 592, 4. *Carth.* 32. 474. 1 *Sid.* 320. 3 *T. Rep.* 344. 4 *T. Rep.* 394. 5. *Skin.* 59. *Ray.* 473. *Carth.* 32. The admiralty being once properly possessed of a cause, takes cognizance of every thing appertaining to it, as incident. 3 *Bl. Com.* 108. 6 *Vin. Abr.* 515. 1 *Ray.* 446. 2 *Ruth. Inst.* 594. Besides, all these cases clearly establish a distinction between a want of jurisdiction, and a dismission of the libel

for good cause. The case in 4 *Inst.* 154, and that of 2 *R.* 3. demonstrate, that where it is proved, 1st. That the sovereign of the complainant is in amity with our sovereign ; and 2d. That his sovereign was in amity with the sovereign of the captor ; the party may sue for restitution. The admiralty of England will decide, though a foreign power issued the captor's commission. 3 *Bulsh.* 27, 8, 9. 2 *Vern.* 592. *Sir L. Jenk.* 755.

The act of bringing the vessel into an American port, must be regarded as a voluntary election to give a jurisdiction, which they might otherwise have avoided. If the American courts have no jurisdiction, the captors avoid all jurisdiction, as they avoid that of their own country ; for, the attempt by a French Consul to take cognizance in our ports, can never be countenanced. But shall they keep the vessel and cargo here *ad libitum*, and Americans, as well as neutrals, wait their motions ? for, it is urged, that reprisals cannot issue till the courts of the captors have refused justice ; and those courts cannot enquire into the merits till the vessel is brought within the jurisdiction of France.

THE COURT, having kept the cause under advisement for several days, informed the counsel, that besides the question of jurisdiction as to the District Court, another question fairly arose upon the record,—whether any foreign nation had a right, without the positive stipulations of a treaty, to establish in this country, an admiralty jurisdiction for taking cognizance of prizes captured on the high seas, by its subjects or citizens, from its enemies ? Though this question had not been agitated, THE COURT deemed it of great public importance to be decided ; and, meaning to decide it, they declared a desire to hear it discussed. *Du Ponceau*, however, observed, that the parties to the appeal did not conceive themselves interested in | the point ; and that the French minister had given p. 16 no instructions for arguing it. Upon which, JAY, *Chief Justice*, proceeded to deliver the following unanimous opinion.

BY THE COURT : The Judges being decidedly of opinion, that every District Court in the *United States*, possesses all the powers of a court of Admiralty, whether considered as an instance, or as a prize court, and that the plea of the aforesaid Appellee, *Pierre Arcade Johannene*, to the jurisdiction of the District Court of *Maryland*, is insufficient : THEREFORE IT IS CONSIDERED by the Supreme Court aforesaid, and now finally decreed and adjudged by the same, that the said plea be, and the same is hereby overruled and dismissed, and that the decree of the said District Court of Maryland, founded thereon, be, and the same is hereby revoked, reversed and annulled.

AND the said Supreme Court being further clearly of opinion, that the District Court of *Maryland* aforesaid, has jurisdiction competent to enquire, and to decide, whether, in the present case, restitution ought to

be made to the claimants, or either of them, in whole or in part (that is whether such restitution can be made consistently with the laws of nations and the treaties and laws of the *United States*) THEREFORE IT IS ORDERED AND ADJUDGED that the said District Court of *Maryland* do proceed to determine upon the libel of the said *Alexander S. Glass*, and others, agreeably to law and right, the said plea to the jurisdiction of the said court, notwithstanding.

AND the said Supreme Court being further of opinion, that no foreign power can of right institute, or erect, any court of judicature of any kind, within the jurisdiction of the *United States*, but such only as may be warranted by, and be in pursuance of treaties, IT IS THEREFORE DECREED AND ADJUDGED that the admiralty jurisdiction, which has been exercised in the *United States* by the Consuls of *France*, not being so warranted, is not of right.

IT IS FURTHER ORDERED by the said Supreme Court, that this cause be, and it is hereby, remanded to the District Court, for the *Maryland* District, for a final decision, and that the several parties to the same do each pay their own costs.

Penhallow, et al. v. Doane's Administrators.

(3 Dallas, 54) 1795.

THIS was a Writ of Error, directed to the Circuit Court for the District of *New-Hampshire*. The case was argued from the 6th to the 17th of *February*; the Attorney General of the *United States*, (*Bradford*) and *Ingersoll*, being Counsel for the Plaintiffs in error; and *Dexter*, *Tilghman* and *Lewis*, being Counsel for the Defendants in error.

The Case, reduced to an historical narrative, by Judge *Paterson*, in delivering his opinion, exhibits these features:

'This cause has been much obscured by the irregularity of the pleadings, which present a medley of procedure, partly according to the common, and partly according to the civil, law. We must endeavour to extract a state of the case from the Record, Documents, and Acts, which have been exhibited.'

It appears, that on the 25th of *November*, 1775 (1 *Jour. Congress*, 259) Congress passed a series of Resolutions respecting captures. These Resolutions are as follow:

'Whereas it appears from undoubted information, that many vessels,
'which had cleared at the respective Custom-houses in these Colonies,
'agreeable to the regulations established by Acts of the *British* Parliament,
'have, in a lawless manner, without even the semblance of just authority,
'been seized by his Majesty's ships of war, and carried into the harbour

'of *Boston*, and other ports, where they have been rifled of their cargoes,
'by order of his Majesty's naval and military officers, there commanding,
'without the said vessels having been proceeded against by any form
'of trial, and without the charge of having offended against any law.

'And whereas orders have been issued in his Majesty's name, to the
'commanders of his ships of war, to proceed as in the case of actual
'rebellion against such of the sea-port towns and places being accessible
'to the king's ships, in which any troops shall be raised or military works
p. 55 'erected, | under colour of which said orders, the commanders of his
'majesty's said ships of war have already burned and destroyed the
'flourishing and populous town of *Falmouth*, and have fired upon and
'much injured several other towns within the United Colonies, and
'dispersed at a late season of the year, hundreds of helpless women and
'children, with a savage hope, that those may perish under the approach-
'ing rigours of the season, who may chance to escape destruction from
'fire and sword, a mode of warfare long exploded amongst civilized
'nations.

'And whereas the good people of these colonies, sensibly affected
'by the destruction of their property and other unprovoked injuries,
'have at last determined to prevent as much as possible a repetition
'thereof, and to procure some reparation for the same, by fitting out
'armed vessels and ships of force. In the execution of which commend-
'able designs it is possible, that those who have not been instrumental
'in the unwarrantable violences above mentioned may suffer, unless
'some laws be made to regulate, and tribunals erected competent to
'determine the propriety of captures. Therefore resolved,

'1. That all such ships of war, frigates, sloops, cutters, and armed
'vessels as are or shall be employed in the present cruel and unjust war,
'against the United Colonies, and shall fall into the hands of, or be taken
'by, the inhabitants thereof, be seized and forfeited to and for the purposes
'herein after mentioned.

'2. Resolved, That all transport vessels in the same service, having
'on board any troops, arms, ammunition, cloathing, provisions, military
'or naval stores of what kind soever, and all vessels to whomsoever
'belonging, that shall be employed in carrying provisions or other
'necessaries to the *British* army or armies, or navy, that now are, or shall
'hereafter be within any of the United Colonies, or any goods, wares,
'or merchandize for the use of such fleet or army, shall be liable to
'seizure, and with their cargoes shall be confiscated.

'3. That no master or commander of any vessel shall be entitled to
'cruize for, or make prize of any vessel or cargo, before he shall have
'obtained a commission from the Congress, or from such person or persons

'as shall be for that purpose appointed, in some one of the United 'Colonies.

'4. That it be and is hereby recommended to the several legislatures 'in the United Colonies, as soon as possible, to erect Courts of Justice, 'or give jurisdiction to the courts now in being, for the purpose of deter- 'mining concerning the captures to be made as aforesaid, and to provide 'that all trials in | such case be had by a Jury under such qualifications, p. 56 'as to the respective legislatures shall seem expedient.

'5. That all prosecutions shall be commenced in the court of that 'Colony, in which the captures shall be made, but if no such court be at 'that time erected in the said colony, or if the capture be made on open 'sea, then the prosecution shall be in the court of such Colony as the 'captor may find most convenient; provided that nothing contained in 'this resolution shall be construed so as to enable the captor to remove 'his prize from any Colony competent to determine concerning the seizure, 'after he shall have carried the vessel so seized within any harbor of the 'same.

'6. That in all cases an appeal shall be allowed to the Congress, or 'such person or persons as they shall appoint for the trial of appeals, 'provided the appeal be demanded within five days after definitive 'sentence, and such appeal be lodged with the secretary of Congress 'within forty days afterwards, and provided the party appealing shall 'give security to prosecute the said appeal to effect, and in case of the 'death of the secretary during the recess of Congress, then the said appeal 'to be lodged in Congress within twenty days after the meeting thereof.

'7. That when any vessel or vessels, shall be fitted out, at the expence 'of any private person or persons, then the captures made, shall be to 'the use of the owner or owners of the said vessel or vessels; that where 'the vessels employed in the capture shall be fitted out at the expence 'of any of the United Colonies, then one third of the prize taken shall 'be to the use of the captors, and the remaining two thirds to the use of 'the said Colony, and where the vessels so employed, shall be fitted out 'at the continental charge, then one third shall go to the captors, and the 'remaining two thirds, to the use of the United Colonies; provided 'nevertheless, that if the capture be a vessel of war, then the captors 'shall be entitled to one half of the value, and the remainder shall go to 'the colony or continent as the case may be, the necessary charges of 'condemnation of all prizes being deducted before distribution made.'

That, on the 23d March, 1776, Congress resolved that the inhabitants of these colonies be permitted to fit out armed vessels, to cruise on the enemies of the United Colonies.

That, on the 2d April, 1776, Congress agreed on the form of a com-

mission to commanders of private ships of war; that the commission run in the name of the Delegates of the *United Colonies of New-Hampshire, &c. and was signed by the President of Congress.*

P. 57 That, on the 3d *July*, 1776, the Legislature of *New-Hampshire*, | passed an act for the trial of captures; of which the part material in the present controversy, is as follows:—

'And be it further enacted, That there shall be erected and constantly held in the town of *Portsmouth*, or some town or place adjacent, in the county of *Rockingham*, a court of justice, by the name of the Court Maritime, by such able and discreet person, as shall be appointed and commissioned, by the Council and Assembly, for that purpose, whose business it shall be to take cognizance, and try the justice of any capture or captures, of any vessel or vessels, that have been, may or shall be taken, by any person or persons whomsoever, and brought into this colony, or any recaptures, that have or shall be taken and brought thereinto.

'And be it further enacted That any person or persons who have been, or shall be concerned in the taking and bringing into this colony, any vessel or vessels employed or offending, or being the property as aforesaid, shall jointly, or either of them by themselves, or by their attornies, or agents, within twenty days after being possessed of the same in this Colony, file before the said Judge, a libel in writing, therein giving a full and ample account of the time, manner, and cause of the taking such vessel or vessels. But in case of any such vessel or vessels, already brought in as aforesaid, then such libel shall be filed within twenty days next after the passing of this act, and at the time of filing such libel, shall also be filed, all papers on board such vessel or vessels, to the intent, that the Jury may have the benefit of the evidence, therefrom arising. And the judge shall as soon as may be, appoint a day to try by a jury, the justice of the capture of such vessel or vessels, with their appurtenances and cargoes; and he is hereby authorized and empowered to try the same. And the same judge shall cause a notification thereof, and the name, if known, and description of the vessel, so brought in, with the day set for the trial thereon, to be advertised in some newspapers printed in the said Colony (if any such paper there be) twenty days before the time of the trial, and for want of such paper, then to cause the same notification to be affixed on the doors of the Town-House, in said *Portsmouth*, to the intent that the owner of such vessel, or any persons concerned, may appear and shew cause (if any they have) why such vessel, with her cargo and appurtenances, should not be condemned as aforesaid. And the said Judge shall, seven days before the day set and appointed for the trial of such vessel, or vessels, issue his warrant to any constable or constables within the county aforesaid, commanding them, or either of them, to

assemble the inhabitants of their towns respectively, and to draw out of the box, in manner provided for drawing jurors, to serve at the Superior | Court of Judicature, so many good and lawful men as the said Judge p. 58
shall order, not less than twelve, nor exceeding twenty-four; and the constable or constables shall, as soon as may be, give any person or persons, so drawn to serve on the jury in said Court, due notice thereof, and shall make due return of his doings therein to the said Judge, at or before the day set and appointed for the trial. And the said jurors shall be held to serve on the trial of all such vessels as shall have been libelled before the said Judge, and the time of their trial, published, at the time said jurors are drawn, unless the Judge shall see cause to discharge them, or either of them before; and if seven of the jurors shall appear and there shall not be enough to compleat the number of twelve (which shall be a pannel) or if there shall be a legal challenge, to any of them, so that there shall be seven, and not a pannel, it shall and may be lawful for the Judge, to order his clerk, the sheriff, or other proper officer, attending said court, to fill up the jury with good and lawful men present; and the said jury when so filled up, and impannelled, shall be sworn to return a true verdict, on any bill, claim, or memorial which shall be committed to them according to law, and evidence; and if the jury shall find, that any vessel or vessels, against which a bill or libel is committed to them have been offending, used, employed or improved as aforesaid, or are the property of any inhabitants of *Great-Britain* as aforesaid, they shall return their verdict thereof to the said Judge, and he shall thereupon condemn such vessel or vessels, with their cargoes, and appurtenances, and shall order them to be disposed of, as by law is provided: and if the jury shall return a special verdict, therein setting forth certain facts, relative to such vessel or vessels (a bill against which is committed to them) and it shall appear to the said Judge, by said verdict, that such vessel or vessels, have been infesting the sea coast of *America*, or navigation thereof, or that such vessels have been employed, used, improved, or offending, or are the property of any inhabitant, or inhabitants of *Great-Britain*, as aforesaid, he, the said Judge, shall condemn such vessel or vessels, and decree them to be sold, with their cargoes, and appurtenances, at public vendue; and shall also order the charges of said trial and condemnation, to be paid out of the money which such vessel and cargo, with her appurtenances, shall sell for to the officers of the court, according to the table of fees, last established by law of this Colony, and shall order the residue thereof to be delivered to the captors, their agents, or attornies, for the use and benefit of such captors, and others concerned therein: and if two or more vessels (the commanders whereof, shall be properly commissioned) shall jointly take such vessel, the money

which she and her cargo shall sell for (after payment of charges as afore-
p. 59 said) shall | be divided between the captors in proportion to their men. And the said Judge is hereby authorized to make out his precept, under his hand and seal, directed to the sheriff of the county aforesaid (or if thereto requested by the captors or agents to any other person to be appointed by the said Judge) to sell such vessel and appurtenances, and cargo, at public vendue, and such sheriff or other person after deducting his own charges for the same, to pay and deliver the residue, according to the decree of the said Judge.

'And be it enacted by the authority aforesaid, That any person or persons, claiming the whole, or any part or share, either as owner or captor of any such vessel, or vessels, against which a libel is so filed, may jointly, or by themselves, or by their attornies or agents, five days before the day set and appointed for the trial of such vessel or vessels, file their claim before the said Judge ; which claim shall be committed to the jury, with the libel, which is first filed, and the jury shall thereupon determine and return their verdict, of what part or share such claimant or claimants, shall have of the capture, or captures ; and every person or persons who shall neglect to file his or their claim in the manner as aforesaid, shall be forever barred therefrom.

'And be it further enacted by the authority aforesaid, That every vessel, which shall be taken and brought into this Colony, by the armed vessels of any of the United Colonies of *America*, and shall be condemned as aforesaid, the proceeds of such vessels and cargoes, shall go and be, one third part to the use of the captors, and the other two thirds, to the use of the colony, at whose charge, such armed vessel was fitted out.

'And where any vessel or vessels shall be taken by the fleet and army of the United Colonies, and brought into this colony, and condemned as aforesaid, the said Judge shall distribute and dispose of the said vessels, and cargoes, according to the resolves and orders of the *American* Congress.

'And whereas, the honorable Continental Congress have recommended, that in certain cases an appeal should be granted from the court aforesaid.

'Be it therefore enacted, That from all judgments, or decrees, hereafter to be given in the said court maritime, on the capture of any vessel, appurtenances or cargoes, where such vessel is taken, or shall be taken by any armed vessel, fitted out at the charge of the United Colonies, an appeal shall be allowed to the Continental Congress, or to such person or persons, as they already have, or shall hereafter appoint, for the trials of appeals, provided the appeal be demanded within five days, after
p. 60 definitive sentence given, and such appeal shall be lodged | with the

Secretary of the Congress, within forty days afterwards; and provided the party appealing, shall give security to prosecute said appeal with effect; and in case of the death of the Secretary, during the recess of the Congress, the said appeal shall be lodged in Congress, within twenty days, after the next meeting thereof; and that from the judgment, decrees, or sentence of the said court, on the capture of any vessel, or cargo which have been or shall hereafter be brought into this colony, by any person or persons, excepting those who are in the service of the United Colonies, an appeal shall be allowed to the superior court of Judicature, which shall next be held in the county aforesaid.

'And whereas no provision has been made by any of the said resolves for an appeal from the sentence or decree of the said Judge, where the caption of any such vessel or vessels may be made by a vessel in the service of the United Colonies, and of any particular colony, or person together:

'Therefore be it enacted by the authority aforesaid: That in such cases, the appeal shall be allowed to the then next superior Court as aforesaid: Provided the Appellant shall enter into bonds with sufficient sureties to prosecute his appeal with effect. And such superior Court, to which the appeal shall be, shall take cognizance thereof, in the same manner as if the appeal was from the inferior Court of Common Pleas, and shall condemn or acquit, such vessel or vessels, their cargoes, and appurtenances, and in the sale, and disposition of them, proceed according to this act. And the Appellant shall pay the court, and jury, such fees as are allowed by law in civil actions.'

That, on the 30th *January*, 1777, Congress resolved, that a standing committee, to consist of five members, be appointed, to hear and determine upon Appeals brought against sentences passed on libels in the courts of Admiralty in the respective states.

That *Joshua Stackpole*, a citizen of *New-Hampshire*, commander of the armed brigantine called the *M'Clary*, acting under the commission and authority of Congress, did, in the month of *October*, 1777, on the high seas, capture the brigantine *Susanna*, as lawful prize.

That *John Penhallow, Joshua Wentworth, Ammi R. Cutter, Nathaniel Folsom, Samuel Sherburne, Thomas Martin, Moses Woodward, Niel M'Intire, George Turner, Richard Champney, and Robert Furness*, all citizens of *New-Hampshire*, were owners of the brigantine *M'Clary*.

That *George Wentworth* was agent for the captors.

That, on the 11th *November*, 1777, a libel was exhibited to the Maritime Court of *New Hampshire*, in the names of *John* | *Penhallow* and *Jacob* p. 61
Treadwell, in behalf of the owners of the *M'Clary*, and of *George Wentworth*, agent for the captors, against the *Susanna*, and her cargo; to which

claims were put in by *Elisha Doane, Isaiah Doane,* and *James Shepherd,* citizens of *Massachusetts.*

That, on the 16th *December,* 1777, a trial was had before the said court, when the Jury found a verdict in favour of the Libellants ; whereupon judgment was rendered, that the *Susanna,* her cargo, &c. should be forfeited, and deemed lawful prize, and the same were thereby ordered to be distributed according to law.

That an appeal to Congress was, in due time, demanded, but refused by the said court, because it was contrary to the law of the State.

That then the said Claimants prayed an appeal to the superior Court of *New Hampshire,* which was granted.

That, on the first *Tuesday* of *September,* 1778, the superior Court of *New Hampshire,* proceeded to the trial of the said appeal, when the Jury found in favour of the Libellants ; that thereupon the court gave judgment, that the *Susanna,* with her goods, claimed by *Elisha Doane, Isaiah Doane,* and *James Shepherd,* were forfeited to the Libellants, and the same were ordered to be sold at public vendue, for their use and benefit, and that the proceeds thereof, after deducting the costs of suit, and charges of sale, be paid to *John Penhallow* and *Jacob Treadwell,* agents for the owners, and to *George Wentworth,* agent for the captors, to be by them paid and distributed according to law.

That the claimants did, in due time, demand an appeal from the said sentence to Congress, and did also tender sufficient security or caution to prosecute the said appeal to effect, and that the same was lodged in Congress, within forty days after the definitive sentence was pronounced in the superior court of *New Hampshire.*

That, on the ninth of *October,* 1778, a petition from *Elisha Doane* was read in Congress, accompanied with the proceedings of a Court of Admiralty for the State of *New Hampshire,* on the libel, *Treadwell* and *Penhallow, versus* brig *Susanna,* &c. praying, that he may be allowed an appeal to Congress ; whereupon it was ordered, that the same be referred to the committee on appeals. *Fourth Journal of Congress,* 586.

That, on the 26th *June,* 1779, the commissioners of appeal, or the Court of Commissioners, gave their opinion, that they had jurisdiction of the cause.

That the articles of confederation bear date the 9th *July,* 1778, and were ratified by all the states on the 1st *March,* 1781. |

p. 62 That, by these articles, the *United States* were vested with the sole and exclusive power of establishing courts for receiving and determining finally appeals in all cases of capture.

That such a court was established, by the style of ' The Court of ' Appeals in cases of capture.' By the commission, the Judges were ' to hear, try, and determine all appeals from the Courts of Admiralty

' in the States respectively, in cases of capture.' *6th Journal of Congress*, 14, 21, 75.

That, on the 24th *May*, 1780, Congress resolved, ' That all matters respecting appeals in cases of capture, now depending before Congress, or the Commissioners of Appeals, consisting of Members of Congress, be referred to the newly erected Court of Appeals, to be there adjudged and determined according to law.'

That in the month of *September*, 1783, the Court of Appeals, before whom appeared the parties by their advocates, did, after a full hearing and solemn argument finally adjudge and decree, that the sentences or decrees passed by the inferior and superior Courts of Judicature of *New Hampshire*, so far as the same respected *Elisha Doane*, *Isaiah Doane*, and *James Shepherd*, should be revoked, reversed, and annulled, and that the property, specified in their claims, should be restored, and that the parties each pay their own costs on the said appeal.

Here the cause rested till the adoption of the existing Constitution of the *United States*; except an ineffectual struggle before Congress, on the part of *New Hampshire*, and an unavailing experiment, at common law, to obtain redress on the part of the Appellants. After the organization of the judiciary under the present government, the representatives of *Elisha Doane*, who was one of the Appellants, exhibited a libel in the District Court of *New Hampshire*, which was legally transferred to the Circuit Court, against *John Penhallow*, *Joshua Wentworth*, *Ammi R. Cutter*, *Nathaniel Folsom*, *Samuel Sherburne*, *Thomas Martin*, *Moses Woodward*, *Niel M'Intire*, *George Turner*, *Richard Champley*, *Robert Furness*, & *George Wentworth*.

This libel, after setting forth the proceedings in the different courts, states, that the brigantine *Susanna*, with her tackle, furniture, apparel and cargo, and also the monies arising from the sales thereof, came, after the capture, to the hands and possession of *Joshua Wentworth*, and *George Wentworth*, whereby they became liable for the same, together with the captors and owners. That after the death of *Elisha Doane*, letters of administration of the personal estate of the said *Elisha* were granted to *Anna Doane*, his widow, and *Isaiah Doane*, and that the widow afterwards intermarried with *David Stoddard Greenough*. The Libellants pray process against the respondents | to shew cause, why the decree of p. 63
the Court of Appeals should not be carried into execution, and they also pray, that right and justice may be done in the premises and that they may recover such damages as they have sustained by reason of the taking of the *Susanna*.

The Respondents, protesting, that they never were owners of the *M'Clary*, and that they have none of the effects of the *Susanna*, nor her

cargo in their possession, say, that the *Susanna* was in the custody of the Marshal, and, upon the final decree of the superior Court of *New Hampshire*, sold for the benefit of the owners and mariners of the *M'Clary*, and distributed among them according to law; that the decision of the said court was final; that no other court ever had, or hath, or ever can have power to revoke, reverse and annul the said decree, and, in a subsequent part of the pleadings, that the District Court of *New Hampshire* hath no authority to carry the decree of the Court of Appeals into execution, or to give damages.

To this sort of plea and answer, neither and yet both, the Libellants reply, that the matters contained in their libel are just and true, and that they are ready to verify and prove the same; that the matters and things alledged by the Respondents are false and untrue; that the Court of Commissioners, and Court of Appeals were duly constituted, and had jurisdiction of the subject-matter; that no other Court hath or can have authority to draw into question the legality of their decisions, and that the District Court of *New Hampshire* hath jurisdiction.

I have extracted and consolidated the material parts of the libel, plea, answer, replication, rejoinder, sur-rejoinder, &c. if they may be so termed, without detailing the allegations of the parties as they arise in the course of procedure.

Upon these pleadings the parties went to a hearing before the Circuit Court of *New Hampshire*, which, after full consideration, decreed, that the Respondents should pay to the Libellants their damages and costs, occasioned by their not complying with the decree of the Court of Appeals; the quantum of which to be ascertained by Commissioners. This interlocutory sentence was pronounced the 24th *October*, 1793.

The Commissioners reported, that the *Susanna*, her cargo, &c. were, on the 2d *October*, 1778, being the assumed time of sale, worth

£.5,895 14 10

That they calculated thereon 16 years interest, viz. from the 2d. *October* 1778, to 2d. *October* 1794, amounting to

5,659 17 4

£.11,555 12 2

p. 64 On this report being affirmed, the Circuit Court pronounced their definitive sentence on the 24th *October*, 1794, that the Libellants recover against the Respondents the sum of 38,518 dollars and 69 cents, damages, and 154 dollars, and 30 cents, costs. The Respondents, conceiving

themselves aggrieved, have removed the cause before this court for revision.

The Record being returned, the Plaintiff in error on the 2d February 1798, assigned the following errors :

' To the Chief Justice and the Associate Justices of the Supreme Court of the *United States*, to be holden at the City of *Philadelphia*, on the first *Monday* of *February* in the year of our Lord one thousand seven hundred and ninety-five, *John Penhallow*, *Joshua Wentworth*, *Ammi Ruhammah Cutter*, *Nathaniel Fulsom*, *Samuel Sherburne*, *sen. Thomas Martin*, *Moses Woodward*, *Neal M' Intire*, *George Turner*, *Richard Champney*, *Robert Furness*, *and George Wentworth*, Plaintiffs in error, against *David Stoddart Grenough*, and *Anna* his wife, and *Isaiah Doane*, Administrators of the estate of *Elisha Doane*, deceased, Defendants.

' HUMBLY SHEW, That in the Record and Process aforesaid, hereto annexed, and in passing the final Decree, it is manifestly erred in this, viz. That whereas it was decreed in favour of the said *David Stoddart Grenough*, and *Anna* his wife, and *Isaiah Doane*, the said decree ought to have been in favour of the said *John Penhallow*, and others, the Plaintiffs :—and for other and further Errors, they assign the following, viz.

' *Firstly*. That by said decree it was ordered, that the said *John Penhallow* and others, Plaintiffs, be condemned in damages for their not performing a certain decree of a Court claiming Appellate jurisdiction in prize causes, held in the City of *Philadelphia*, on the *seventeenth day of September*, *Anno Domini*, 1783, when, in fact, the said last mentioned Court had no jurisdiction power, or authority whatever, by law, to make and pass the said decree ; and that the said decree was illegal and a nullity.

' *Secondly*. That there is also manifest Error in this, viz. That if the said last mentioned Court had at the time of their passing said decree, Appellate jurisdiction of said cause, yet said decree was altogether erroneous and impossible to be performed or executed, because, (as by the said *Greenough*'s and others own shewing, in their libel aforesaid) the said *Elisha Doane* was, at the time of making and passing the said decree, viz. on the *seventeenth day of September*, *Anno Domini* 1783, and long before that time, dead ; when, by the same decree, it is ordered that restoration of said property be made to said *Elisha Doane*.

' *Thirdly*. There is also manifest error in this, viz. That said cause was not brought before Congress, or the Commissioners | by them p. 65
appointed, to hear and try appeals in prize causes, according to the Resolve of Congress, but repugnant thereto, viz. by way of complaint, and that no appeal from the said decree of said Court of *New-Hampshire*, was allowed by the same Court, or by Congress.

Fourthly. There is also manifest error in this, viz. That in and by the

said libel upon which the decree aforesaid in said Circuit Court is made, damages for not performing the decree of said Court of Appeals, are not prayed for—wherefore, the said Circuit Court ought not to have decreed or condemned the Plaintiffs in damages as is done by said final decree.

Fifthly. There is also manifest error in this, viz. That said final decree of said Circuit Court, was not made upon a due trial and examination of the merits of the capture of the said Brigantine *Susanna,* her tackle, apparel and furniture, and of the goods, wares, and merchandizes, and of the evidences or proofs which might have been adduced by the Plaintiffs in error if such trial had been had. But the decree of the Court of Appeals was received and admitted as the only evidence of the right of claim of the said *Grenough* and others, the libellants, to the said Brigantine, her tackle, apparel and furniture, and of the said goods, wares and merchandizes, condemned, and of the illegality of the capture and condemnation aforementioned in said libel, which is contrary to the usage and customs of Admiralty, Maritime and Prize Courts, and altogether unwarranted by law.

Sixthly. There is manifest error also, in this, viz.—That by the shewing of the said Libellants, the monies arising from the sale of said brigantine and cargo, &c. were paid to the said *Joshua Wentworth* and *George Wentworth* as agents, to be distributed according to law, viz: one half to the owners of the said privateer, *M'Clary,* and the other to the captors, viz. to the officers and seamen on board, which were distributed accordingly. Whereas in fact by said final decree, they the Plaintiffs in error, and *Joshua* and *George* as agents, and the other Plaintiffs as owners, are made liable, and condemned in full damages for the whole value of said brigantine, her tackle, apparel, and furniture, and of said goods, wares and merchandizes, which is altogether illegal.

Seventhly. There is also manifest error in this, viz.—That it doth not appear by the copy of the record of said Court of Appeals, filed and used in this cause, how the same cause, in which that court decreed as aforesaid, came before said court, or was legally instituted, or had day therein, at the time of passing said decree.

Eighthly. There is manifest error in this, also, viz.—That said Circuit
p. 66 Court, in passing said final decree, and in all the | proceedings in the same, acted and proceeded as a Court of Admiralty, when as such, they, by law, had no jurisdiction of said cause, and could not legally take cognizance thereof.

WHEREFORE, for these and other errors in the record and process, and final decree aforesaid, of the said Circuit Court, the said Plaintiffs in error, pray, That the final decree aforesaid, of the said Circuit Court,

may be reversed, annulled, and held to be altogether void, and they restored to all things which they have lost.

JOHN S. SHERBURNE.

The Defendants replied in *nullo est erratum* ; and thereupon issue was joined.

For the Plaintiffs in error, the arguments were of the following purport.

I. ERROR. This is a question between citizens of the *United States* ; a citizen of one State being a citizen of every State. *Const. Art. s.* Questions between subjects of different States, belong entirely to the law of nations. 3 *Bl. Com.* 69. but between citizens of the same State, the municipal law, even in questions of prize during a war, is of supereminent control. 1 *Wood.* 137. 2 *Wood.* 3 *Wood.* 454. *Hen. Bl. Rep.* 4 *T. Rep.* 3 *Atk.* 195. *Parke* 166. 180. 3 *Bro.* 304. But this appeal was never properly before the Congressional Court of Appeals. *Doane* petitioned Congress, and Congress referred the petition to the Committee of Appeals. 6 *Vol. Journ. Cong.* 133, 167. In the case of the *Sandwich Packet,* a committee was appointed, and upon their report, Congress allowed the appeal. Regularly, in the present instance, the appeal ought to have been allowed by the court below, and the record lodged with the Secretary of Congress ; or there should, at least, appear a special allowance of the appeal by Congress, as in the case of the *Sandwich Packet,* and not a mere reference to a committee. The court of *New Hampshire,* in fact, refused to allow the appeal ; and the appearance of the party in the Congressional Court of Appeals, could not cure any defect, as he there pleaded directly to the jurisdiction, and notice signifies nothing against a compulsory judgment. The legal, customary, modes to compel the return of a record, by *certiorari,* and a writ of diminution, &c. might have been resorted to. 3 *Bac. Abr.* 204. *Conset on courts.* 187. There was no privity between the Court of Appeals and the Circuit Court ; and an inferior Court cannot execute the decrees of a superior Court. 1 *Sid.* 418. 1 *Vent.* 32. 6 *Vin.* 373. *pl.* 2. *Esp.* 87. 1 *Lev.* 243. *Raym.* 473. *Doug.* 580. *Cowp.* 176. But had the Congressional Court of Appeals jurisdiction in this case ? That court is extinct ; and may now be considered in the light of a foreign court ; and the decrees of foreign courts are regarded on | a footing of reciprocity. p. 67
Whether, then, the Congressional Court of Appeals, was, in this instance, a court of the last resort, is the gist of the controversy ; and we contend that it was not, but that the superior Court of *New Hampshire,* was, by the law of the State, the Court of the last resort. On an appeal, or on a writ of error, like this, in the nature of an appeal, the Plaintiff in error may use every defence which he could have urged below ; and the authorities evince that the competency of the court giving the judgment

may be enquired into. 1 *Bac. Abr.* 630. *Doug.* 5. 3 *Term Rep.* 29. 130. 132. 269. *Carth. Parke on Ins.* 11 *State Trials*, 222. 232. 2 *Dom.* 676. *Ayl.* 72. 3. Whether the Congressional Court had any jurisdiction at all, must depend on a comparison between the resolves of Congress of *November* 1775, and the law of *New Hampshire*, of *July* 1776; and to solve that difficulty, three subordinate questions may be discussed:—1st. Had Congress *exclusive* jurisdiction of prize causes in *Nov.* 1775?—2d. Are their resolutions on that subject mandatory and absolute; or recommendatory—and 3d. Did they necessarily imply, and authorise, a revision of facts, which had already been established by the verdict of a Jury.—

1. Had Congress exclusive jurisdiction of prize causes in *Nov.* 1775? If *New Hampshire* had any original right to take cognizance of prize causes, the Plaintiff in error must prevail; for, in such case, the jurisdiction would be, at least, concurrent with that claimed by Congress. But, wherever an alliance is not *corporate*, but *confederate*, the sovereignty resides in each State. *Federalist, p. Adam's Def.* 162. 3. And in the histories of *Holland* and of *Germany* the rule will be illustrated and confirmed. 1 *Montesq.* 263. 7 *Vol. Encyclopædia*, 709. *Chesterfield's Works*, 1 *vol. Sir William Temple*, 114. *Adams' Def.* 362. Now, the State retained all the powers which she did not expressly surrender to the Union; a State cannot cease to be sovereign without its own act; nor can sovereignty be asserted but upon a clear title. 7 *Journ. Cong. p.* 49, &c. Congress had only the power to *recommend* certain acts to the States, they had no absolute right to enforce a performance, nor to inflict a penalty for disobedience. Whatever power Congress possessed must have been derived from *the People*. If Congress had a right of erecting Courts of Appeals from *New Hampshire*, it must be in consequence of an authority derived from *New Hampshire*;—all the other twelve States could not give it: Nor had Congress the *exclusive* power of war; as a retrospective view of the revolutionary occurrences will demonstrate. The Colonies, totally independent of each other before the war, became distinct, independent, States, when they threw off their allegiance to the *British* crown, and Congress was no longer a Convention of Agents
p. 68 for Colonies, but of Ambassadors from | sovereign States. *Adams' Def.* 1 *vol.* 362. 3. 4. In that character they were uniformly considered by Congress; and on the 24th of *June*, 1776, [2 *Vol. Journ. Cong.* 229.] when that body recommends passing laws on the subject of treason, the crime is declared to be committed against the colonies, individually, and not against the confederation. The powers of the first Congress of 1774, were, indeed, only those of consultation, to project the proper measures for obtaining a redress of grievances; they were, in effect, a counsel of advice. Their credentials, as well as the opinions of writers, manifest the truth of this assertion. 1 *Ramsay's Hist.* 143. 1 *Journ.*

Cong. 17. 54. 55. The second Congress sat on the same authority; with the same latitude to obtain a redress of grievances; but, all the credentials of the members bear date before the news of the battle of *Lexington*; (19 April 1775) those from *Pennsylvania*, *New-Jersey*, and *Virginia*, merely authorise a meeting in Congress; and none of the rest hold out the idea of war, though those from *Massachusetts* seem to have given the greatest latitude. 1 *Journ. Cong.* 56. 3 *Vol. Cong.* 14. It appears clearly, then, that Congress at those stages of the Revolution, possessed no positive powers, by express delegation. When, however, the war afterwards came on, Congress seized on such powers as the necessity of the case required to be exercised: but still, the validity of those powers depends on subsequent ratifications, or universal acquiescence; and if *New-Hampshire* has ever ratified the assumption of a right to hold appeals *in all cases* of capture as prize, we abandon the cause. But in a variety of instances, it is manifest, that, although some of the assumed powers of Congress were confirmed, others were denied and repelled. Thus, the power of embargo was desired by Congress, but never conceded by the states. 4 *Journ. Cong.* 575. 321. 331; and in *Pennsylvania*, it was even thought necessary to pass a law to indemnify, all persons, who acted under the authority of the resolutions of Congress, &c. 2 *Vol. Dall. Edit.* 111. Still, however, it is conceded, that Congress, from the necessity of the case, and a general acquiescence, might raise an army, and direct the military operations of the war; though even in that respect, it is questionable, whether *Massachusetts* would have consented to the Congressional appointment of a commander in chief, had General *Ward* been successful at *Bunker's Hill*. But the States, by their acquiescence in this exercise of the rights of war, on the part of Congress, did not convey an exclusive power to the Federal head, nor divest themselves of their individual authority to wage war, issue letters of marque, &c. War is that state in which a nation prosecutes its rights by force. *Vatt. b.* 3. *c.* 1. *s.* 1. Now, the fact is, that the *New-England* colonies had first made war, according to p. 69
this definition; and at their instance the other colonies afterwards joined them. 1 *Ramsay's Hist.* 192. *New-Hampshire*, accordingly, voted 2000 men for the service. *Ib.* 395; established post-offices; and vested a committee of safety with powers equal to those of a dictator. *Ib.* 395. *Connecticut*, likewise, made war on her own individual authority; *Ticonderoga* was taken by *Allen*; and *Arnold* made a prize of a vessel on *Lake Champlaine*. *Gord. Hist.* 349. 1 *Vol. Journ. Cong.* 81. At this period the States must have been possessed of individual sovereignty; for, the sovereign power alone can raise troops. *Vatt. b* 2. *c.* 2. *s.* 7; and both *Massachusetts* and *Connecticutt* had actually fitted out and armed vessels to cruize against the enemy in October, 1775, (*South-Carolina* soon following the example) whereas the resolution of Congress respecting

prizes, did not pass till the succeeding month. *Gord. Hist.* 428. *Ramsay's Hist.* 224. Could the resolutions of Congress at that time take away the jurisdiction of *New-Hampshire*, without her own consent? and the articles of confederation, at a later period, expressly reserved to the respective states, the right of issuing letters of marque, &c. after a declaration of war by the *United States*. By considering the circumstances under which Congress exercised other powers, we may be furnished with some analogies in support of our doctrine, respecting the power claimed, as an incident of war, to hold appeals in all cases of capture. Congress were allowed to issue money; but they could not guard it from counterfeit, nor make it a legal tender; nor effectually bind the States to redeem it; though all these incidents were essential to support the credit and currency of the money. Congress assumed the power of regulating the post-office; but they could impose no penalties for a breach of their resolution on the subject. Congress received Ambassadors, and other public ministers; but when the immunity of the *French* minister's house was violated, the State of *Pennsylvania* only could punish the offender. *Dall. Rep. De Longchamp's* case. Congress made treaties, but they could make no law to enforce an observance of them. Even for effectuating their resolutions, relative to admiralty jurisdiction, Congress were obliged to address themselves by recommendation to the states, individually; 5 *Journ. Cong.* 215; and *New-Hampshire* passed a law, granting to Congress the power that was requested, *in the case of foreigners only*, with an allowance of only a day for making the appeal. In that law Congress acquiesced, *Ib.* 459. till the dispute arose in this very case. 9 *Journ. Cong.* 45. 87. 97. 98. *Dall. Rep.* 71. This distinction has been taken in *Pennsylvania*, that on the evacuation of *Philadelphia*, all public military property belonged to Congress, and all private property to the State. |
p. 70 To manifest, if possible, more forcibly the participation of the individual states, in the power assumed and exercised by Congress, we find that the very commissions issued by Congress, were countersigned by the Governors of the respective states. By the law of *New-Hampshire*, passed in July 1776, a power was given to the Executive to issue letters of marque, &c. and the act of countersigning the congressional commissions was equivalent to the exercise of that power. In the instructions to privateers, it is, likewise observable, that Congress authorise the captors to proceed to libel and condemn their prizes 'in any court erected for the trial of maritime affairs, in any of these colonies.' 2 *Journ. Cong.* 106. 116. 118. But surely, it is possible for a state, to delegate the power of issuing letters of marque, &c. and yet retain a jurisdiction over prizes brought into her ports; or, reversing the proposition, to give up that jurisdiction, and yet retain the power of issuing letters of marque. A court of appeal is not a necessary incident of sovereignty. If there be a court judging by the

law of nations, no complaint can be made by foreign powers; the rest depends on municipal law. 4 *T. Rep.* 382. 3 *Atk.* 401. *Coll. Jurid.* It has been questioned, indeed, whether any court can decide on the legality of a prize, which has been captured under the authority of a different power, from that by which the court was constituted: but in the case of a confederated sovereignty, each member of the confederation may, undoubtedly, give power to the others to decide on prizes taken under its separate authority. Thus, likewise, it appears that *France* established courts in the West-Indies, to determine the legality of prizes taken by *American* vessels, although no article of the treaty provided for such an establishment. 5 *Journ. Cong.* 440. In other treaties, however, the case is expressly provided for, and the judicatures of the place, into which the prize, taken by either of the contracting parties, shall have been conducted, may decide on the legality of the captures, according to the laws and regulations of the States, to which the captors belong. *Prussian Treaty, Art.* 21. *s.* 4. *Dutch Treaty, Art.* 5. *Swedish Treaty, Art.* 18. *s.* 4. But the language of the articles of confederation demonstrates the political independence, and separate authority, of the States: 'each state retains its sovereignty, freedom, and independence, and every power, jurisdiction and right, which is not by this confederation *expressly* delegated to the *United States*, in Congress assembled.' *Art.* 3. If, indeed, the States had not, individually, all the powers of sovereignty, how could they transfer such powers, or any of them, to Congress? Does not Congress itself, by the appointment of a committee to draft the articles of confederation; and by its earnest solicitation, that the several states would ratify | the instrument; evince a sense of its own political impotence, and of p. 71
the plenitude of the State authorities? But, after all, it must be considered that *Doane*, the Defendant in error, waved the appeal to Congress, by carrying his case into the Supreme Court of *New-Hampshire*, instead of applying immediately for relief to Congress, when the inferior State Court refused to grant an appeal to the congressional court of appeals; and the Supreme Court of *Massachusetts* has determined in an action of Trover between the same parties, that the court of appeals had no jurisdiction in this cause. *Sit finis litium.*

2. The second subordinate question is—Are the Resolutions of Congress, respecting prize causes, mandatory and absolute; or only recommendatory? In spirit and in terms they are no more than recommendatory; such as the State might at pleasure, either carry into effect, or reject. The State, which erected the Court of Admiralty, possessed the power, likewise, to regulate the Appellate jurisdiction from its decrees. Thus, the act of Pennsylvania modelled the Appellate power in a special manner, as to the time of appealing; and denied the appeal altogether, as to facts found by the verdict of a jury. The Supreme Court of *New-*

Hampshire was in existence long before the Resolutions of Congress were passed; and there is no pretence for Congress to claim a controuling, or appellate, power, upon the judgments, or decrees, there pronounced; though Congress might *recommend* a particular mode of proceeding as convenient and advantageous. As far as respected *Foreigners*, *New-Hampshire* concurred in the opinion of Congress; but rejected it in cases, like the present, between citizens.

3. The third subordinate question is—Whether the Resolutions of Congress, necessarily imply and authorise a revision of facts, which had already been established by the verdict of a jury? The fair construction of the Resolution of Congress is, that there shall be an appeal on points of law appearing on the record. The appeal from a jury is not known here, though it is familiar in *New-England*; but even in *New-England*, the appeal is always from one jury to another jury, and a jury may, in some measure, proceed on their own knowledge. 3 *Bl. Com.* 330. 367. In the case of the Sloop *Active* (2 *Vol. p.*) the Chief Justice (M'KEAN) was decisively of opinion, that an appeal did not lie from the Admiralty of the State to the Congressional Court of Appeals, as to facts found by a Jury: and, in the same case, the General Assembly expressed the same opinion, by their instructions to the Delegates in Congress. *Journals*, 31*st of January*, 1780. After a jury Trial, facts cannot be re-examined on a writ of Error. 3 *Bl. Com.* 330. 367. |

p. 72 II. ERROR. It appears on the record that *Doane* was dead when the judgment was given: for, the libel itself sets forth the commitment of administration to his representatives before judgment; and, although that may not be conclusive, it is strong evidence of his death, upon which the court will decide the fact. *Pr. Reg. ch.* 1. *p.* 264. 3 & 4 *Wood.* 377. 2 *Bac.* 204. 4 *Vin.* 429. *T. Raym.* 463. It has been said, that even if *Doane* were dead, it was no abatement, being in a civil law court. 1 *Cha. Ca.* 122: but the case referred to, as an authority, was merely a bill of review, which is not *stricti juris*, and was dismissed. Besides, the person who filed that bill had no *privity*, and was not entitled to it; and even if he had, the exception might have been error, notwithstanding the dismissal of the bill. It is likewise said, that death was no abatement in an ecclesiastical court. *Lev.* ; but it is evident from the authority cited, that the party representing the deceased, must come into court before judgment can go against him. 3 *Huberus*, 582. The most that can reasonably be urged is, that the decree was good, so far as it pronounced the captured ship to be free; but it was void, so far as it made any order upon *Doane* to do any particular act. See 3 *T. Rep.* 323. The Circuit Court (which has been called a court of *review*) was, in fact, only the Court of Appeals continued; but *Doane's* administrators were never called upon, and, therefore, could not be obliged to go into that court. The ground

of the opinion of the Circuit Court is, that damages shall be recovered for not restoring the property to *Doane*; who, being then dead, the restitution was impossible. Besides, letters of administration were only taken out in *Massachusetts*, which would not operate in *New Hampshire*, where alone, if any where, the debt was valid. *Lovelace on wills.*

III. ERROR. The argument in support of this error has been anticipated in discussing the first error assigned.

IV. ERROR. Damages were not asked by the Libellant in the Circuit Court. The libel prays, indeed, that the decree of the Court of Appeals might be carried into effect; that damages might be given for the illegal capture of the ship; and that general relief might be granted; but it does not pray for damages on account of the non-performance of the decree of the Court of Appeals. A judgment which gives damages, where they ought not to be given, is erroneous: as where the damages are laid at 100l. in the declaration, and the judgment is rendered for 200l. No damages are to be allowed on reversal. *Lee on capt.* 241. There ought to have been an account of the value of the thing to be restored, by the decree of the Court of Appeals; and as that court gave no damages for the unlawful taking of the vessel, no other court had power to give them. Nor, indeed, ought any damages to have been given, as the order p. 73
for restitution was not directed to the Respondents. Besides the damages are given against the Defendants *jointly*, whereas each should have been charged *severally* with the sum which came into his hands; 3 *T. Rep.* 371. *Cowp.* 506. 4 *Vin.* 444. 7 *Vin.* 252. And it does not even appear that they had notice of the decree of the Court of Appeals, though it is stated on the record that they were heard by their advocates sometime *before* it was pronounced. A monition should have issued; and the superior court should have inhibited the court of *New Hampshire* from proceeding on their judgment: otherwise, if that court did so proceed, and under their order the vessel was sold and the money paid away, the persons who paid it are not responsible. 3 *T. Rep.* 125. An agent paying over trust money without notice of appeal, is excused. 4 *Burr.* 1985. *Cowp.* 565. 2 *Ld. Ray.* 1210. And the Admiralty only compels agents to account for the money actually in their hands. *H. Bl.* 476. 483. 3 *T. Rep.* 323. 326. 7. 343. 4 *T. Rep.* 382. 393. 1 *Bl. Rep.* 315. In the Admiralty a number of persons are joined, in order to prevent a multiplicity of suits: but, substantially, each person stands on his own *separate* ground, and a mode is established for assessing several damages. *Doug.* 579.[1]

V. ERROR. That the court below did not examine into the merits, cannot be deemed error, if they had no jurisdiction to meddle with

[1] PATERSON, *Justice*:—If the damages were improperly given, *jointly*, by the Circuit Court, can this court rectify the error, or direct the Circuit Court to do it?
Bradford:—This Court cannot do it, because they are not possessed of evidence to shew in what proportions the damages ought to be paid by the Respondents.

the subject at all. This assignment of error, therefore, cannot be maintained.

VI. Error. The argument on this, was anticipated in the discussion of the 4th error assigned.

VII. Error. The argument on this, was anticipated in the discussion of the first error assigned.

VIII. Error. The fate of this error was submitted, without remark, to the opinion of the court.

For the defendant in error, the answers were of the following tenor.

I. Error :—The objection that the appeal was not properly before the Congressional Court, ought not at this stage to be sustained, since the party appeared there, and pleaded to the jurisdiction ; and the court took cognizance of the cause. The court *ad quem*, and not the court *a quo* the proceeding is brought, must determine whether the appeal lay.
p. 74 A certified | copy of the decree of the Court of *New Hampshire* was lodged with Congress ; and the case was treated in the same way that Congress (who were not bound down to particular forms) treated other similar cases. Nor can it injure the Defendant in error, that he took his first appeal to the superior Court of *New Hampshire* ; for, that State had certainly a right to establish different Courts of Appeal, provided the last resort was made to Congress. But an appeal was tendered and refused ; and a *certiorari* only lies to Courts of Record, which was not the case with the inferior Court of *New Hampshire*. The act of Congress directs a removal by writ of error in all cases and therefore takes away all objections not appearing on the record. Nor is it effectual to say, that an inferior court cannot execute the judgment of a superior Court ; for, we had no remedy at common law ; the question of prize or no prize being solely of Admiralty jurisdiction. *Dall. Rep.* : the only remedy was in the District Court of *New Hampshire*. It has even been contended, that a Court of Admiralty of *England* may grant execution on a judgment in *Friezland* against an *Englishman*. 6 *Vin.* 513. *pl.* 12. 1 *Lev.* 267. 1 *Vent.* 32. *Godb.* 260. and a Court of Admiralty may proceed to give effect to its own sentence upon a new libel being filed. 4 *T. Rep.* 385. We contend then, that Congress had jurisdiction to determine the appeal as well before, as after, the ratification of the articles of confederation :—before the ratification, from the nature and necessity of the case ; and after the ratification from the force of the compact. Congress was chosen by the representatives of the people ; and when war commenced, it could not have been prosecuted, without vesting that body with a jurisdiction, which, should pervade the whole continent. A formal compact is not essential to the institution of a government. Every nation that governs itself, under what form soever, without any dependence on a foreign power, is a *sovereign state*. In every society there must be a sovereignty.

1 *Dall. Rep.* 46, 57. *Vatt. B.* 1. *ch.* 1. *s.* 4. The powers of war form an inherent characteristic of national sovereignty; and, it is not denied, that Congress possessed those powers. As, therefore, the decision of the question, whether prize, or no prize, is a part of the power and law of war, *Doug.* 585. 6. and must be governed by the law of nations, 3 *Bl. Com.* 68, 69. 2 *Wood.* 139. 4 *Term Rep.* 394, 400, 401, it follows, as a necessary consequence, that if Congress possessed the whole power of war, it possessed all the parts;—the incidents, as well as the principal jurisdiction. Under this impression, Congress recommended the institution of prize courts in the several States; but reserved to itself the right of appeal; and its journals are filled with the exercise of powers derived from the same source, and having | no greater pretensions to validity. On the p. 75
2d *May*, 1775, the militia are directed to be trained for defence. On the 1st *June*, Congress declare that they stand on the defensive merely, and the invasion of Canada by any of the Colonies is objected to. On the 14th *June*, an army is directed to be raised. On 15th. *June*, a General is appointed. On the 6th *July*, war is, in effect, declared. On the 7th *November*, the articles of war, inflicting death in certain cases, were passed. On the 25th *Nov.* the resolutions concerning prizes were adopted. On the 28th *November*, rules and orders were established for the government of the navy. On the 5th *December* provision was made for salvage in the case of re-captured vessels. On the 13th *December* a fleet was established. On 20th *December* it was declared that the law of nations should regulate the proceedings in prize causes. On 22d *December*, the Naval Committee act. On 26th *Dec.* the United Colonies are pledged for the redemption of the paper money. On the 23d *March* and 24th *July*, 1776, the equipment of privateers is authorised. On 2d and 3d *April*, the form of a commission for privateers is settled. On the 4th *July*, Independence is declared. On 26th *Aug.* half pay was allowed to disabled officers. On 5th *September*, it was resolved that propositions for peace should only be made to Congress. On the 9th *September*, a committee is appointed on an appeal in the case of the schooner *Thistle*, and the stile of the confederation was changed from '*United Colonies*' to '*United States*.' On 16th *September*, additional battalions were raised. On 20th *September*, a new set of articles of war were substituted instead of the former. On the 21st *October*, the oath to be taken by officers in the Continental service was prescribed. On 30th *January* and 8th *May*, 1777, a standing committee was appointed, to hear and determine appeals. On 31st *January*, a decree of a committee was set aside on an appeal. On 8th *May*, a new commission for privateers was settled. On the 14th *October*, Congress resolved to retaliate by condemning as prize, the enemy's vessels, brought in by their own mariners. On the 6th *February*, 1778, Congress formed a treaty of alliance with *France*. On 9th *July*, 1778, the articles of confederation

were ratified and signed by all the states, except *New-Jersey*, *Delaware*, and *Maryland*. On 27th *July*, 1778, new numbers were added to the committee of appeals. On 14 *January*, 1779, Congress resolved that they would not conclude a truce or treaty with *Great-Britain*, without the consent of *France*. On the 6th of *March*, the objection to the appellate jurisdiction of Congress, as to facts found by a jury, was urged by *Pennsylvania* in the case of the sloop *Active*. On 15th *Jan.* 1780, and 24th *May*, a court of appeals in the case of captures was instituted. On 21st *January* and 30th *March*, 1784, the proceedings in the case of the *Susanna*, came
p. 76 before Congress. On 24th *May*, 1780, the stile of the court of appeals was settled. On 26th *June*, 1786, a court of review was instituted. After so extensive a display of power and jurisdiction, it is absurd to oppose theory to practice, and to reason in the abstract, instead of adopting the evidence of facts. But on principle as well as practice, the old commissioners of appeals had jurisdiction. Congress had an imperfect sovereignty previous to the declaration of independence; and the articles of confederation are only a definement of rights, before vague and uncertain. The acts of Congress were either performed by virtue of delegated powers, or of subsequent ratifications, and the acquiescence of the state legislatures and the people. On the declaration of independence, a new body politic was created; Congress was the organ of the declaration; but it was the act of the people, not of the state legislatures, which were likewise nothing more than organs of the people. Having, therefore, a national sovereignty, extending to all the powers of war and peace, including, as a necessary incident, the right to judge of captures, the commissioners of appeals were lawfully instituted; and it is absurd to say that both the Federal and State governments held sovereignty in the same points, nor can the jurisdiction of the court of appeals that succeeded the commissioners be now questioned. There would, indeed, be no end of disputes, if the judgments of a Supreme Court, on the point of jurisdiction, could be enquired into. *Lee on Cap.* 242. *Collec. Jurid.* 153. 139. 3 *Bl. Com.* 411. 57. 1 *Bac. Abr.* 524. That point was lawfully before the court of appeals; and the court of appeals, when they made their decree, in 1783, were clearly the supreme court of admiralty *under the confederation*. The court of appeals took the cause up, as it had been left by the commissioners of appeals; and not on a new appeal from *New-Hampshire*; they, therefore, virtually decided, that the commissioners of appeals had jurisdiction. If, then, this court may now enquire into the judgment of the court of appeals, every district court in the Union may do the same; and the controversy would never be at rest.

The individual States had no right to erect courts of prize, but under the authority of Congress, who derived their authority from the whole people of *America*, as one united body. Was it not considered, *during the*

war. by every man, that Congress were thus vested with this and all the other rights of war and peace, and not the individual states ? Why, else, was it necessary by a special resolution of Congress, (4 *April*, 1777) to give validity to captures made by privateers bearing commissions issued by the governor of *North-Carolina*, previously to the 4th of *April*, 1777 ? And on what other principle | could that resolution be 'transmitted to each p. 77
of the United States, as a law in any prize cause, which may be depending or instituted in any of the courts therein, and to secure the condemnation of vessels taken under such commissions ?' The very privateer that made the capture in question, was commissioned by Congress ; and the usual bond was given by her owners to the President of Congress : Could, then, a privateer acting under the commission of Congress, be deemed to act under any other authority ; or be governed by any other laws than those which Congress had prescribed ? Had *New-Hampshire* a right to erect courts for the condemnation of prizes made by vessels commissioned by Congress, unless by the authority of Congress, and upon the terms of their resolutions ?

It is urged, however, that this is a case between citizens of the same country ; and, therefore, not within the general principle : But we answer, that a citizen of *Massachusetts* is a foreigner with regard to *New-Hampshire*. The law of *New-Hampshire*, respecting admiralty matters, passed in 1776, long before the articles of confederation were ratified ; and 'till those articles were ratified, there is no colour to alledge, that the citizens of one state, were citizens of all the rest. But, if Congress had a jurisdiction co-extensive with the object, they are alone competent to modify or limit its exercise ; and, when they reserved to themselves the appeal *in all cases*, it is clear that they intended an appeal should lie as well in cases between citizens, as in cases between citizens and foreigners ; —from the verdict of a jury on matters of fact, as well as from the judgment of the court in matters of law. Nor can the municipal law of a state, govern the question of prize, or no prize, even between citizens ; though it may regulate the distribution of prize money, for, in that respect, none but the citizens of the state can be interested. In the case of the sloop *Active*, all the states but *Pennsylvania* voted originally that the decision should be according to the law of nations, and not according to the municipal law of the state ; and although in the year 1784, six of the states voted in support of a different opinion ; yet, it must be recollected that the hearing was then *ex parte* ; Congress were evidently influenced by an apprehension of the consequence of enforcing the decree of the court of appeals in that case against the State of *Pennsylvania*, as they have been in this case against the State of *New-Hampshire* ; and the whole proceeding was marked and discoloured with want of candor.

II. ERROR :—The death of *Doane*, under the circumstances that

appear on the record, and the law and practice of the court, did not abate the appeal. Every intendment will be made to support a judgment.
p. 78 1 *Wils.* 2. 2 *Stra.* 1180. Regularly, indeed, | a suit abates by the death of the party; but the law is not invariably so, where the party dying is immaterial to the cause. 1 *Eq. Abr.* 1. The proceeding in the present case was *in rem*; and, therefore, the life of the party was not material. *Ayliff.* The court refused to examine into an abatement by death, in a bill of review for that purpose, the decree being made twenty years before. 1 *Cha. Ca.* 122. Nor is there any abatement by death of parties in a spiritual court. 2 *Roll. Rep.* 18. 2 *Lev.* 6. And this being a court of civil law, the principle equally applies. The present record states that the appellant and appellee appeared by their advocates; and if any error in this respect occurred in the court of appeals, a court of review was established by Congress, who might have examined and corrected it; there is no court that has now a jurisdiction to do so; though the error, if it existed, should have been assigned, and relied on, in the Circuit Court for the district of *New-Hampshire.* But, after all, the court may reject that part of the libel, which states the administration to have been committed, prior to the time of pronouncing the judgment of the Court of Appeals. 2 *Vin.* 404. *pl.* 4 (*bis.*) *pl.* 5. *pl.* 7. *pl.* 9. *pl.* 11. It is not said by the record that *Doane* was then dead, but merely that administration had been granted on his estate, which is only evidence of his death. On this point also were cited *Brook. Tit. Judgment* 113. *Sal.* 8. *pl.* 21. *Salk.* 33. *pl.* 6. *Carth.* 118.

III. Error:—The argument in opposition to this assignment of errors, has been anticipated in discussing the first Error.

IV. Error:—That the Circuit Court gave *damages*, whereas the judgment of the Court of Appeals was for *restitution*, is not a valid objection. If the Court of Appeals had attached the party, damages must have been paid before he would have been discharged:—damages are the substance of the whole proceeding. Nor is it exceptionable, that damages are not expressly prayed for by the libel; since that is necessarily included in the prayer for general relief.

V. Error:—That the Circuit Court did not enquire into the merits of the original decree, is surely no legal objection. There were no merits out of the record, brought before the court. If any facts had been offered and rejected, a bill of exceptions might have been taken. Nor can this court enquire into the facts. The law gives *an appeal* from the District to the Circuit Court; but a *writ of error* only lies from the Circuit Court to the Supreme Court. On a writ of Error, no extrinsic fact can be enquired into; and the diversity of the process proves, that it was the intent of the Legislature to preclude such an enquiry. |

p 79 VI. Error:—The damages, it is contended, ought to have been

several and distributive, according to the actual receipt of the different parties; and it is said that a mere agent ought not to be made responsible, after he has *bona fide* paid over the money; but the injury was done by the joint act of the original Libellants; *Wentworth's* paying away the money which he had received as agent, is denied and traversed in the replication; he must have had full notice of the appeal, and, therefore, acted at his own peril. If, however, the judgment of the Circuit Court should be deemed erroneous in the mode of decreeing damages, this court will correct it, and give such a judgment as the court below ought to have done. On this point the following authorities were cited: *Doug.* 577. 1 *Dall. Rep.* 95.

VII. ERROR:—The answer to this assignment of error was anticipated in the course of the preceding answers.

VIII. ERROR:—That the Circuit Court had jurisdiction as a Court of Admiralty, has been decided in the case of *Glass et al. v. the sloop Betsey.*[1]

On the 24th of *Feb.* 1795, the Judges delivered their opinions *seriatim.*

PATERSON, *Justice*:—This cause has been much obscured by the irregularity of the pleadings, which present a medley of procedure, partly according to the common, and partly according to the civil, law. We must endeavour to extract a state of the case from the Record, Documents, and Acts, which have been exhibited.

[Here the Judge delivered the historical narrative of the cause, with which this report is introduced, and then proceeded as follows:]

PATERSON, *Justice.* I have been particular in stating the case, and giving an historical narrative of the transaction, in order that the grounds of decision may be fully understood. The pleadings consist of a heap of materials, thrown together in an irregular manner, and, if examined by the strict rules of common law, cannot stand the test of legal criticism. We are, however, to view the proceedings as before a Court of Admiralty, which is not governed by the rigid principles of common law. Order and systematic arrangement are no small beauties in juridical proceedings; and, whatever may be said to the contrary, it will, on fair investigation, appear, that good pleading is founded on sound logic, and good sense.

In the discussion of the cause, several questions have been agitated; some of which, involving constitutional points, are of great importance.

The jurisdiction of the Commissioners of Appeals has been questioned. |

The jurisdiction of the Court of Appeals has been questioned. p. 80

These jurisdictions turning on the competency of Congress, it has been questioned, whether that body had authority to institute such tribunals.

And, lastly, the jurisdiction of the District Court of *New Hampshire* has been questioned. In every step we take, the point of jurisdiction meets us.

[1] 3 Dallas, 6.

I. The question first in order, is, whether the Commissioners of Appeals had jurisdiction, or, in other words, whether Congress, before the ratification of the articles of confederation, had authority to institute such a tribunal, with appellate jurisdiction in cases of prize ?

Much has been said respecting the powers of Congress. On this part of the subject the counsel on both sides displayed great ingenuity, and erudition, and that too in a stile of eloquence equal to the magnitude of the question. The powers of Congress were revolutionary in their nature, arising out of events, adequate to every national emergency, and co-extensive with the object to be attained. Congress was the general, supreme, and controuling council of the nation, the centre of union, the centre of force, and the sun of the political system. To determine what their powers were, we must enquire what powers they exercised. Congress raised armies, fitted out a navy, and prescribed rules for their government : Congress conducted all military operations both by land and sea : Congress emitted bills of credit, received and sent ambassadors, and made treaties : Congress commissioned privateers to cruize against the enemy, directed what vessels should be liable to capture, and prescribed rules for the distribution of prizes. These high acts of sovereignty were submitted to, acquiesced in, and approved of, by the people of *America*. In Congress were vested, because by Congress were exercised with the approbation of the people, the rights and powers of war and peace. In every government, whether it consists of many states, or of a few, or whether it be of a federal or consolidated nature, there must be a supreme power or will ; the rights of war and peace are component parts of this supremacy, and incidental thereto is the question of prize. The question of prize grows out of the nature of the thing. If it be asked, in whom, during our revolution war, was lodged, and by whom was exercised this supreme authority ? No one will hesitate for an answer. It was lodged in, and exercised by, Congress ; it was there, or no where ; the states individually did not, and, with safety, could not exercise it. Disastrous would have been the issue of the contest, if the States, separately, had exercised the powers of war.
p. 81 For, in such case, there would have been as many supreme | wills as there were states, and as many wars as there were wills. Happily, however, for *America*, this was not the case ; there was but one war, and one sovereign will to conduct it. The danger being imminent, and common, it became necessary for the people or colonies to coalesce and act in concert, in order to divert, or break, the violence of the gathering storm ; they accordingly grew into union, and formed one great political body, of which Congress was the directing principle and soul. As to war and peace, and their necessary incidents, Congress, by the unanimous voice of the people, exercised exclusive jurisdiction, and stood, like Jove, amidst the deities of old, paramount, and supreme. The truth is, that the

States, individually, were not known nor recognized as sovereign, by foreign nations, nor are they now ; the States collectively, under Congress, as the connecting point, or head, were acknowledged by foreign powers as sovereign, particularly in that acceptation of the term, which is applicable to all great national concerns, and in the exercise of which other sovereigns would be more immediately interested ; such, for instance, as the rights of war and peace, of making treaties, and sending and receiving ambassadors. Besides, every body must be amenable to the authority under which he acts. If he accept from Congress a commission to cruize against the enemy, he must be responsible to them for his conduct. If, under colour of such commission, he had violated the law of nations, Congress would have been called upon to make atonement and redress. The persons who exercise the right or authority of commissioning privateers, must, of course, have the right or authority of examining into the conduct of the officer acting under such commission, and of confirming or annulling his transactions and deeds. In the present case, the Captain of the *M'Clary* obtained his commission from Congress ; under that commission he cruised on the high seas, and captured the *Susanna* ; and for the legality of that capture he must ultimately be responsible to Congress, or their constituted authority. This results from the nature of the thing ; and, besides, was expressly stipulated on the part of Congress. The authority exercised by Congress in granting commissions to privateers, was approved and ratified by the several colonies or states, because they received and filled up the commissions and bonds, and returned the latter to Congress—*New-Hampshire* did so, as well as the rest.

Another circumstance, worthy of notice, is the conduct of *New-Hampshire*, by her Delegate in Congress, in the case of the sloop *Active*. *Acts of Congress, 6th March*, 1779.—By this decision, *New-Hampshire* concurred in binding the other states. Did she not also bind herself ? Before the articles of confederation were ratified, or even formed, a league of some kind subsisted | among the states ; and, whether that p. 82
league originated in compact, or a sort of tacit consent, resulting from their situation, the exigencies of the times, and the nature of the warfare, or from all combined, is utterly immaterial. The States, when in Congress, stood on the floor of equality ; and, until otherwise stipulated, the majority of them must controul. In such a confederacy, for a state to bind others, and not, in similar cases, be bound herself, is a solecism. Still, however, it is contended, that *New-Hampshire* was not bound, nor Congress sovereign as to war and peace, and their incidents, because they resisted this supremacy in the case of the *Susanna*. But I am, notwithstanding, of opinion, that New-Hampshire was bound, and Congress supreme, for the reasons already assigned, and that she continued to be bound, because she continued in the confederacy. As long as she continued to be one of

the federal states, it must have been on equal terms. If she would not submit to the exercise of the act of sovereignty contended for by Congress, and the other states, she should have withdrawn herself from the confederacy.

In the Resolutions of Congress of the 6th of *March*, 1779, is contained a course of reasoning, which, in my opinion, is cogent and conclusive. 5 *Jour. Cong.* 86, 87, 88, 89, 90.

'The committee, consisting of Mr. *Floyd*, Mr. *Ellery*, and Mr. *Burke*, to whom was referred the report of the committee on appeals of January 19th, 1779, having, in pursuance of the instructions to them given, examined into the causes of the refusal of the Judge of the Court of Admiralty for the State of *Pennsylvania*, to carry into execution the decree of the Court or committee of appeals, report,

'That on a libel in the court of admiralty for the state of Pennsylvania in the case of the sloop Active, the jury found a verdict in the following words, viz. "one fourth of the nett proceeds of the sloop Active and her cargo to the first claimants, three fourths of the nett proceeds of the said sloop and her cargo to the libellant and the second claimant, as per agreement between them; which verdict was confirmed by the judge of the court, and sentence passed thereon. From this sentence or judgment and verdict, an appeal was lodged with the secretary of Congress, and referred to the committee appointed by Congress "to hear and determine finally upon all appeals brought to Congress," from the Courts of Admiralty of the several States:

'That the said committee, after solemn argument and full hearing of the parties by their advocates, and taking time to consider thereof, proceeded to the publication of their definitive sentence or decree, thereby reversing the sentence of the Court of Admiralty, making a new decree,
p. 83 and ordering process to | issue out of the Court of Admiralty for the state of Pennsylvania to carry this their decree into execution:

'That the judge of the Court of Admiralty refused to carry into execution the decree of the said committee on appeals, and has assigned as the reason of his refusal, that an act of the Legislature of the said State has declared, that the finding of a jury shall establish the facts in all trials in the Courts of Admiralty, without re-examination or appeal, and that an appeal is permitted only from the decree of the judge:

'That having examined the said act, which is entitled, "an act for establishing a Court of Admiralty," passed at a session which commenced on the 4th of August, 1778, the committee find the following words, viz. "the finding of a jury shall establish the facts, without re-examination, or appeal," and in the seventh section of the same act the following words, viz. "in all cases of captures an appeal from the decree of the Judge of Admiralty of this State, shall be allowed to the Continental Congress, or

such person or persons as they may from time to time appoint for hearing and trying appeals."

'That although Congress, by their resolution of *November* 25th, 1775, recommended it to the several legislatures, to erect courts for the purpose of determining concerning captures, and to provide that all trials in such cases be had by a jury, yet it is provided, that in all cases an appeal shall be allowed to Congress, or to such person or persons as they shall appoint for the trial of appeals : ' whereupon,

' *Resolved*, That Congress, or such person or persons as they appoint, to hear and determine appeals from the courts of Admiralty, have necessarily the power to examine as well into decisions on facts as decisions on the law, and to decree finally thereon, and that no finding of a jury in any court of Admiralty, or court for determining the legality of captures on the high seas, can or ought to destroy the right of appeal, and the re-examination of the facts reserved to Congress :

' That no act of any one state can or ought to destroy the right of appeals to Congress, in the sense above declared :

' That Congress is by these *United States*, invested with the supreme sovereign power of war and peace :

' That the power of executing the law of nations is essential to the sovereign supreme power of war and peace :

' That the legality of all captures on the high seas must be determined by the law of nations :

' That the authority ultimately and finally to decide on all matters and questions touching the law of nations, does reside and is vested in the sovereign supreme power of war and peace : |

' That a controul by appeal is necessary, in order to compel a just and p. 84
uniform execution of the law of nations.

' That the said controul must extend as well over the decisions of juries, as judges, in courts for determining the legality of captures on the sea ; otherwise the juries would be possessed of the ultimate supreme power of executing the law of nations in all cases of captures, and might, at any time, exercise the same in such manner, as to prevent a possibility of being controuled ; a construction which involves many inconveniencies and absurdities, destroys an essential part of the power of war and peace entrusted to Congress, and would disable the Congress of the *United States*, from giving satisfaction to foreign nations complaining of a violation of neutralities, of treaties, or other breaches of the law of nations, and would enable a jury, in any one state, to involve the *United States* in hostilities ; a construction, which for these and many other reasons, is inadmissible :

' That this power of controuling by appeal, the several admiralty jurisdictions of the States, has hitherto been exercised by Congress, by the medium of a committee of their own members :

'*Resolved*, That the committee before whom was determined the appeal from the court of Admiralty for the State of *Pennsylvania*, in the case of the sloop *Active*, was duly constituted and authorised to determine the same : '

The yeas and nays being taken, it appears that the States of *New-Hampshire, Massachusetts-Bay, Rhode-Island, Connecticut, New-York, Maryland, Virginia, North-Carolina, South-Carolina*, and *Georgia*, voted unanimously in the affirmative : the State of *Pennsylvania* unanimously in the negative ; and Mr. *Witherspoon*, who was alone from *New-Jersey*, voted also in the negative.

The Congress then voted as follows, viz.

'*Resolved*, That the said committee had competent jurisdiction to make thereon a final decree, and therefore their decree ought to be carried into execution.'

The yeas and nays being taken on this resolution, it appears, that *New-Hampshire, Massachusetts-Bay, Rhode-Island, Connecticut, New-York, Maryland, Virginia, North-Carolina, South-Carolina*, and *Georgia*, voted unanimously in the affirmative ; *Pennsylvania* unanimously in the negative ; and Mr. *Witherspoon*, who was alone from *New-Jersey*, voted on this occasion in the affirmative.

The Congress then resolved as follows, viz.

'*Resolved*, That the General Assembly of the State of *Pennsylvania*, be requested to appoint a committee, to confer with a committee of
p. 85 Congress, on the subject of the proceedings | relative to the sloop *Active*, and the objections made to the execution of the decree of the committee on appeals, to the end that proper measures may be adopted for removing the said obstacles ; and that a committee of three be appointed to hold the said conference, with the committee of the General Assembly of *Pennsylvania* :

'The members chosen, Mr. *Paca*, Mr. *Burke*, and Mr. *R. H. Lee*.'

I shall close this head of discourse with observing, that it is with diffidence I have ventured to give an opinion on a question so novel and intricate, and respecting which, men, eminent for their talents, their literary attainments, and skill in jurisprudence, have been divided in sentiment. The opinion, however, which has been given, is the result of conviction ; if wrong, it is the error of the head, and as such will carry its apology with it.

II. Whether, after the articles of confederation were ratified, the Court of Appeals had jurisdiction of the subject matter ?

However problematical the opinion, which has been delivered on the preceding point, may be, I apprehend, that little doubt or difficulty can arise on the present question. By the 9th article of the Confederation, the *United States*, in Congress assembled, are vested, among other things,

with the sole and exclusive power of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes, taken by land or naval forces in the service of the *United States*, shall be divided or appropriated; of granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas, and establishing courts for receiving and determining finally, appeals in all cases of captures.

The Court of Appeals, in *September* 1783, decided upon the point of jurisdiction either directly, or incidentally; for, after a full hearing, they decreed that the sentences passed by the Superior and Inferior Courts of *New-Hampshire* should be reversed and annulled, and the property be restored. This decree being made by a court, constitutionally established, of competent authority, and the highest jurisdiction, is conclusive and final. It cannot be opened and investigated; for, neither this court, nor any other, can, in a collateral way, review the proceedings of a tribunal, which had jurisdiction of the subject-matter. The Court of Appeals was competent to the decision; they have adjudicated as well on the jurisdiction as the merits of the cause, and we must suppose that they have acted properly. This also is an answer as to irregularities, if any there were, which may have taken place in the proceedings | before the Court p. 86
of Appeals, or in the mode of removing the cause before them. This court cannot take notice of irregularities in the proceedings, or error in the decision, of the Court of Appeals. The question is at rest; it ought not to be again disturbed.

III. Whether the District Court of *New-Hampshire* had jurisdiction; or, in other words, whether the libel exhibited before that court, was the proper remedy, or mode of carrying into execution, either specifically, or by way of damages, the decree of the Court of Appeals?

On this point I entertain no doubts. Recurrence to facts will answer the question. The existence of the Court of Appeals terminated with the old government; this also was the case with the subordinate Court of Admiralty in the State of *New-Hampshire*. The property was not restored to the libellants, nor were they compensated in damages; of course the decree in their favour remains unsatisfied. They had no remedy at common law; they had none in equity; the only forum competent to give redress is the District Court of *New-Hampshire*, because it has admiralty jurisdiction. There they applied, and, in my opinion, with great propriety.

Judges may die, and courts be at an end; but justice still lives, and, though she may sleep for a while, will eventually awake, and must be satisfied.

Having discussed the preliminary questions relative to jurisdiction, we shall now consider the proceedings in the Circuit Court of *New-*

Hampshire. And here the first question is, whether by the death of *Elisha Doane,* before the judgment rendered in the court of appeals, that judgment is not avoided ? The death of *Doane* does not appear on the record of the proceedings before the court of appeals ; it is in evidence from the certificate of the judge of probates, which is annexed to the record transmitted from the Circuit Court of *New-Hampshire.* Many answers have been given to this question ; some of which are cogent as well as plausible. On this subject, it will be sufficient to observe, that admitting the death of *Doane,* and that it can be taken notice of in this court, it is unavailing, because the proceedings in a court of admiralty are *in rem.* The sentence of a court of admiralty, or of appeal in questions of prize, binds all the world, as to every thing contained in it, because all the world are parties to it. The sentence, so far as it goes, is conclusive to all persons.

The most formidable objections have been levelled against the damages.

1. It is said, that the damages ought not to have been given, because
p. 87 they were not prayed. The answer to this objection | is satisfactory—the prayer is for general relief, and therefore sufficient.

2. If any damages ought to be given, yet none ought to have been awarded against *George Wentworth,* because he was an agent, and paid the money over under the decree of the Court of *New Hampshire.*

If any Agent pay over, after notice, he pays wrongfully, and shall not be excused. In this case *George Wentworth* was a party to the suit, he appeared as one of the Libellants, and must be liable to all the legal consequences resulting from such a situation. As a party, he was before the court, and privy to the appeal, which was made in due season. The appeal did, from the moment it was made, suspend the execution of the decree, and that whether it was received or not ;[1] especially in cases like the present, where *George Wentworth* was a party to the suit, before the court, and had notice of its having been tendered or made. In such a predicament, he ought not to have paid over ; but should have awaited the ultimate decision of the Court of Appeals. If he paid, it was at his peril ; he took the risk upon himself, and in case of undue payment, became liable.

It has been said, that an inhibition should have been issued, and that without it the appeal did not suspend the execution of the decree. The writ of inhibition is a proper and necessary writ, not because it suspends the effect of the decree, for that is already done by the appeal ; but because it enables the court of appellate jurisdiction, in case of disobedience, to punish the inferior court as being in contempt. The appeal has not this effect, because it is the act of the party, and not of the superior court.

[1] 2 *Dom.* 686.

A monition, it is said, ought to have been addressed to the Appellees to enforce their appearance before the Court of appellate jurisdiction. The answer is, that *George Wentworth*, as well as the others, did appear both before the Court of Commissioners and the Court of Appeals. If a defect, and inquirable into by this court, it is cured by appearance.

In short, *George Wentworth* was a party to the suit, present in court, and had notice of the appeal. If, in such a situation, he undertook to distribute the proceeds, it was at his own risk: and in case of reversal, he made himself liable.

I have doubts how far the court below could inquire into the question of agency and payment over, especially as the payment is said to have been made, previously to the argument before the Court of Appeals, or even the Court of Commissioners. The decree is for restoration. If the Court of Appeals had issued process to carry their definitive sentence into effect, or | had directed the Maritime Courts of *New Hampshire* to have p. 88
done so, would it, in the instance of *George Wentworth*, have been a legal justification to have said, that he had delivered the property, or paid its proceeds, to the captors? Besides, whatever could have been brought forward, by way of defence, in the Court of Appeals, ought there to have been urged and relied upon; and if the party has omitted to do so, he has slipt his opportunity, and is precluded from taking advantage thereof in future.

I know, that a distinction is made between foreign and domestic judgments; that the latter are conclusive, whereas the former are liable to investigation. Be it so. But is the principle, upon which this distinction is founded, applicable to decrees, on questions of prize, in the highest Court of Admiralty, which, in such cases, is guided by the law of Nations, and not municipal regulations? If it is, it must be under very special circumstances.

3. It is objected, that the damages awarded are joint; whereas they ought to have been several. This objection is a sound one. But as the facts are spread on the record, it is in the power of the court to sever the damages and so to apportion them as to effectuate substantial justice. The damages should have pursued and been admeasured by the original decree, which directed, that one moiety of the proceeds should be paid to the owners, and the other to the captors. *George Wentworth* received a moiety only; he is liable for that, and no more.

4. Another objection is, that interest has been calculated from a wrong period, to wit, from the 2d *October*, 1778; and therefore the decree of the Circuit Court is erroneous.

The Court of Appeals pronounced their definitive sentence in *September* 1783; by which the judgments of the inferior and superior Courts of *New Hampshire* were reversed, and restoration decreed; they also

directed, that the parties should pay their own costs. I am of opinion, that interest should have been computed from the day, on which the definitive sentence of the Court of Appeals was pronounced. Of this there can be no doubt with respect to *John Penhallow* and the owners. Some doubts, however, have been entertained on this point with regard to *George Wentworth*. But for the reasons, which have been assigned, he must be considered in the same situation as the others.

Arguments, deducible from the hardship of the case, have been advanced and insisted upon. It is hard, that *George Wentworth*, who was an agent, should be made personally responsible. It is cruel, that *George Wentworth* should be cut down by the collision of conflicting jurisdictions. But motives of commiseration, from whatever source they flow, must
p. 89 not | mingle in the administration of justice. Judges, in the exercise of their functions, have frequent occasions to exclaim, '*durum valde durum, sed sic lex est.*'

To conclude, the sum of - - - - - - £.5,895 14 10
appears, on the record, to be the aggregate value of the *Susanna*, her cargo, &c.

On this sum interest should be calculated from 17th *September*, 1783, till 24th *October*, 1794, which will amount to 3,920 13 4

Making in the whole - - - - - - - £.9,816 8 2

Equal to 32,721 dollars and 36 cents. The one moiety whereof, being 16,360 dollars and 68 cents, I am of opinion, should be paid by *John Penhallow* and the owners, and the other moiety by *George Wentworth*. The costs in the courts below should be divided in the same manner.

I am also of opinion, that the parties should bear their respective costs, which have arisen on the prosecution of the appeal in this court.

IREDELL, *Justice*. This case, which is of so much novelty and importance, has been argued at the bar with very great ability on both sides. I have listened with the most respectful attention to every thing that has been said upon it, and the opinion, which I am now to deliver, is the result of the best consideration which I have been able to bestow on the subject.

The order in which it has appeared to me most convenient to arrange the different heads of enquiry is as follows :

1. Whether either of the decrees of *June*, 1779, or *September*, 1783, was originally valid ?

2. If either of them was so, whether it was a decree which the District Court of *New Hampshire*, or the Circuit Court of *New Hampshire*, acting specially in this cause for the legal reason alledged, had authority to enforce, either by decreeing a specific execution, or awarding damages for a non-performance of it ?

3. Whether, if the District or Circuit Court had such an authority, it has been executed properly in this instance, under all the circumstances of the case ?

4. Whether, in case the Libellants were entitled to a decree in their favour, but it shall appear that the decree has been erroneous in respect to the relief given, either in the whole or in part, this court can rectify the decree, or order it to be rectified by the court below, or must affirm or reverse in the whole ?

Under the first head it will be proper previously to consider if either of the decrees was final and conclusive, because if that point should be decided in the affirmative, it will render | unnecessary a decision of many p. 90
important questions that otherwise arise in this cause. This previous point, however, cannot be decided on satisfactory principles, without in some measure tracing the origin of the general powers of Congress, from the time of the earliest exercise of their authority, to the period when definite and express powers were solemnly and formally given to them by the articles of confederation. I shall therefore make a few preliminary observations on this subject, though I by no means think it material to go into a full detail.

Under the *British* government, and before the opposition to the measures of the Parliament of *Great Britain* became necessary, each Province in *America* composed (as I conceive) a body politic, and the several Provinces were no otherwise connected with each other, than as being subject to the same common sovereign. Each Province had a distinct legislature, a distinct executive (subordinate to the king), a distinct judiciary, and in particular the claim as to taxation, which began the contest, extended to a separate claim of each province to raise taxes within itself ; no power then existed, or was claimed, for any joint authority on behalf of all the Provinces to tax the whole. There were some disputes as to boundaries, whether certain lands were within the bounds of one Province or another, but nobody denied that where the boundaries of any one Province could be ascertained, all the permanent inhabitants within those boundaries were members of the body politic, and subject to all the laws of it. When acts were passed by the Parliament of *Great Britain* which were thought unconstitutional and unjust, and when every hope of redress by separate applications appeared desperate, then was conceived the noble idea, which laid the foundation of the present independence and happiness of this country, (though independence was not then in contemplation) of forming a common council to consult for the common welfare of the whole, so far as an opposition to the measures of *Great Britain* was concerned. In order to compose this common council each Province chose for itself, in its own way, and by its own authority, without any previous concerted plan of the whole, deputies

to attend at a general meeting to be held in this city. Some appointed by their Assemblies; others by Conventions; some perhaps in other modes; but, in whatever way the appointment was made, it was notoriously done with the hearty consent and approbation of the great body of the people in each Province, and therefore the appointment was unexceptionable to all those who thought the opposition just, and a union of the whole in the measures of opposition necessary. Each Province even appointed as many or as few deputies as it pleased, at its own discretion, which was not objected to, because the Members of Congress
p. 91 did not | vote individually, but the votes given in Congress were by Provinces, as they afterwards were (subsequent to the declaration of Independence, and until the present constitution of the *United States* was formed) by States.

The powers of Congress at first were indeed little more than advisory; but, in proportion as the danger increased, their powers were gradually enlarged, either by express grant, or by implication arising from a kind of indefinite authority, suited to the unknown exigencies that might arise. That an undefined authority is dangerous, and ought to be entrusted as cautiously as possible, every man must admit, and none could take more pains, than Congress for a long time did, to get their authority regularly defined by a ratification of the articles of confederation. But that previously thereto they did exercise, with the acquiescence of the States, high powers of what I may, perhaps, with propriety for distinction, call *external sovereignty*, is unquestionable. Among numerous instances that might be given of this, (and which were recited very minutely at the bar) were the treaties of *France* in 1778, which no friend to his country at the time questioned in point of authority, nor has been capable of reflecting upon since without gratitude and satisfaction. Whether among these powers comprehended within their general authority, was that of instituting courts for the trial of all prize causes, was a great and awful question; a question that demanded deep consideration, and not perhaps susceptible of an easy decision. That in point of prudence and propriety it was a power most fit for Congress to exercise, I have no doubt. I think *all prize causes* whatsoever ought to belong to the national sovereignty. They are to be determined by the law of nations. A prize court is, in effect, a court of all the nations in the world, because all persons, in every part of the world, are concluded by its sentences, in cases clearly coming within its jurisdiction. Even in the case of *citizen* and *citizen* I do not think it a proper subject for mere municipal regulation, because as was observed at the bar, a citizen may make a colourable claim, which the court may not be able to detect, and yet a foreigner be fatally injured by it. In case of a *bona fide* claim, it may appear to be good by the proofs offered to the court, but another person living at a distance may have a superior claim,

which he has no opportunity to exhibit. It is true a general monition issues, and this is considered notice to all the world, but though this be the construction of the law from the necessity of the case, it would be absurd to infer in fact that all the world had actual notice, and therefore no superior claimant to the one before the court could possibly exist. The court, therefore, can never know with certainty whether citizens only are interested in the enquiry. But the words | '*citizen* and *citizen*' in this p. 92
case are very ill applied to the parties in question, they not having been citizens of the same State, the captors having been citizens of *New Hampshire*, and the claimant a citizen of *Massachusetts-Bay*. It never was considered that before the actual signature of the articles of confederation a citizen of one State was to any one purpose a citizen of another. He was to all substantial purposes as a Foreigner to their forensic jurisprudence. If rigorous law had been enforced, perhaps he might have been deemed an *alien*, without an express provision of the State to save him. And as an unjust decision upon the law of nations, in the case of a Foreigner to all the States, might, if redress had not been given, have ultimately led to a foreign war, an unjust decision on the same law in one State, to the prejudice of a citizen of another State, might have ultimately led, if redress had not been given, to a civil war, an evil much the more dreadful of the two. I have made these observations merely as to the propriety that this power should have been delegated, and therefore to shew that if it was assumed without adequate authority, it was not an arbitrary and unnatural assumption of a power, that ought exclusively to belong to a single State ; but by no means with a view to argue, that because it was *proper* to be given, therefore it was *actually* given, a position which, as it would lead to dangerous and inadmissible consequences, cannot be the ground of a legitimate argument.

Some of the arguments at the bar, if pushed to an extreme, would tend to establish, that Congress had unlimited power to act at their discretion, so far as the purposes of the war might require ; and it was even said, that the *Jus Belli* never was in any one of the States, and therefore it could not be delegated by any State to Congress. My principles on this subject are totally different from those which were the foundation of this opinion, and as it is a point of no small importance, and I find on this occasion, as I have formerly done on others, considerable mistakes (as I conceive) by very able men, owing to a misapprehension of terms, I will endeavour to state my own principles on the subject with so much clearness, that whether my opinion be right or wrong, it may at least be understood what the opinion really is.

If Congress, previous to the articles of confederation, possessed any authority, it was an authority, as I have shewn, derived from the people of each Province in the first instance. When the obnoxious acts of Parlia-

ment passed, if the people in each Province had chosen to resist separately, they undoubtedly had equal right to do so, as to join in general measures of resistance with the people of the other Provinces, however unwise
p. 93 and destructive such a policy might, and undoubtedly | would have been. If they had pursued this separate system, and afterwards the people of each Province had resolved that such Province should be a free and independent State, the State from that moment would have become possessed of all the powers of sovereignty internal and external, (viz. the exclusive right of providing for their own government, and regulating their intercourse with foreign nations) as completely as any one of the ancient Kingdoms or Republics of the world, which never yet had formed, or thought of forming, any sort of Federal union whatever. A distinction was taken at the bar between *a state* and *the people of the state*. It is a distinction I am not capable of comprehending. By a *State* forming a Republic (speaking of it as a *moral person*) I do not mean the Legislature of the State, the Executive of the State, or the Judiciary, but *all the citizens which compose that State, and are, if I may so express myself, integral parts of it; all together forming a body politic*. The great distinction between Monarchies and Republics (at least our Republics) in general is, that in the former the monarch is considered as the sovereign, and each individual of his nation as subject to him, though in some countries with many important special limitations: This, I say, is generally the case, for it has not been so universally. But in a Republic, all the citizens, as such, are equal, and no citizen can rightfully exercise any authority over another, but in virtue of a power constitutionally given by the whole community, and such authority when exercised, is in effect an act of the whole community which forms such body politic. In such governments, therefore, the sovereignty resides in the great body of the people, but it resides in them not as so many distinct individuals, but in their politic capacity only. Thus A. B. C. and D. citizens of *Pennsylvania*, and as such, *together with all the citizens of Pennsylvania*, share in the sovereignty of the State. Suppose a State to consist exactly of the number of 100,000 citizens, and it were practicable for all of them to assemble at one time and in one place, and that 99,999 did actually assemble: The State would not be in fact assembled. Why? Because the state in fact is composed of *all* the citizens, not of *a part* only, however large that part may be, and one is wanting. In the same manner as 99l. is not a hundred, because one pound is wanting to complete the full sum. But as such exactness in human affairs cannot take place, as the world would be at an end, or involved in universal massacre and confusion, if entire unanimity from every society was required; as the assembling in large numbers, if practicable as to the actual meeting of all the citizens, or even a considerable part of them, could be productive of no rational result, because

there could be no general debate, no consultation of the whole, nor | of consequence a determination grounded on reason and reflexion, and p. 94
a deliberate view of all the circumstances necessary to be taken into consideration, mankind have long practised (except where special exceptions have been solemnly adopted) upon the principle, that *the majority shall bind the whole*, and in large countries, at least, that representatives shall be chosen to act on the part of the whole. But when they do so, they decide for the whole, and not for themselves only. Thus, when the legislature of any state passes a bill by a majority, competent to bind the whole, it is an act of the whole Assembly, not of the majority merely. So when this court gives a judgment by the opinion of a majority, it is the judgment, in a legal sense, of the whole court. So I conceive, when any law is passed in any state, in pursuance of constitutional authority, it is a law of the whole state acting in its legislative capacity; as are, also, executive and judiciary acts constitutionally authorised, acts of the whole state in its executive or judiciary capacity, and not the personal acts alone of the individuals, composing those branches of government. The same principles apply as to legislative, executive, or judicial acts of the *United States*, which are acts of the people of the *United States*, in those respective capacities, as the former are of the people of a single state. These principles have long been familiar in regard to the exercise of a constitutional power as to treaties. These are deemed the treaties of the two nations, not of the persons only, whose authority was actually employed in their formation. There is not one principle that I can imagine which gives such an effect as to treaties, that has not such an operation on any other legitimate act of government, all powers being equally derived from the same fountain, all held equally in trust, and all, when rightfully exercised, equally binding upon those from whom the authority was derived.

I conclude, therefore, that every particle of authority which originally resided either in Congress, or in any branch of the state governments, was derived from the people who were permanent inhabitants of each province in the first instance, and afterwards became citizens of each state; that this authority was conveyed by each body politic separately, and not by all the people in the several provinces, or states, jointly, and of course, that no authority could be conveyed to the whole, but that which previously was possessed by the several parts; that the distinction between *a state* and *the people of a state* has in this respect no foundation, each expression in substance meaning the same thing; consequently, that one ground of argument at the bar, tending to shew the superior sovereignty of Congress, in the instance in question, was not tenable, and therefore that upon that ground the exercise of the authority in question can not be supported. |

p. 95 I have already, however, stated my opinion, that from the nature of our political situation, it was highly reasonable and proper that Congress should be possessed of such an authority, and this is a consideration of no small weight to induce an inference, that they actually possessed it when their powers were so indefinite, and when it seems to have been the sense of all the states, that Congress should possess all the incidents to external sovereignty, or, in other words, the power of war and peace, so far as other nations were concerned, though the states in some particulars differed, as to the construction of the general powers given for that purpose. Two principles appear to me to be clear. 1. The authority was not possessed by Congress, unless given by all the states. 2. If once given, no state could, by any act of its own, disavow and recall the authority previously given, without withdrawing from the confederation. In the case of the *Active*, ten states out of twelve recognized the authority, *New-Hampshire* voting in support of it. This was in 1779, long after the act of *New-Hampshire* was passed, which has given occasion to the con troversy in this cause, and in the same year when the second act of *New-Hampshire* was passed, which allowed an appeal to Congress in cases (as the act expressed it) ' wherein any subject or subjects of any ' foreign nation or state, in amity with this and the *United States* of ' *America*, should in due form of law, claim the whole, or any part of the ' vessel and cargo in dispute.' The resolution of Congress was dated the 6th *March*, 1779 ; the act of *New-Hampshire* in *November* following. The vote of the delegates of *New-Hampshire*, in the case of the *Active*, would not, indeed, be equivalent to a clear grant of the power, but it is a respectable support of the construction contended for by the defendants in error. It has been properly observed, that a court cannot by its own decision, give itself jurisdiction where it had none before ; but if courts are so constituted that one is necessarily superior to another, the decision of the superior must, to be sure, prevail. This, perhaps, is not conclusive as to the court of commissioners, because it cannot be decided whether it was in fact the superior court in respect to *New-Hampshire*, without deciding whether it was constitutionally so in virtue of power from all the states. This point it would be now necessary for this court to decide, if it were not for the decision of the court of appeals in 1783, a court of acknowledged prize jurisdiction, established in virtue of express authority from all the states (*New-Hampshire* included) and made a court in the last resort as to all prize causes, or in other words (as expressed in the article of confederation itself) *in all cases of captures*. And the decision
p. 96 of this court on the subject of the two contending jurisdictions, I | consider to be final and conclusive, for the following reasons.

1. At the time the decision was given, it was the only court of final appellate jurisdiction, as to cases of captures, in the United States. It

seems therefore to follow necessarily, that *upon all questions of capture* their decision should be final and conclusive, as much as the decision of this Court upon a writ of error from the Circuit Court, or any other branch of its jurisdiction, would be so.

2. To the suggestion at the bar, that the Court of appeals could have no retrospect, several answers, I conceive, may be given.

1. It is taking for granted the very point in dispute, that this decision was retrospective. If Congress possessed this authority before, and the articles of Confederation amounted only to a solemn confirmation of it, it was in no manner retrospective. It was in effect a continuance of the same court acting under an *express*, instead (as before) of acting under an *implied* authority, and allowing the full benefit of an appeal regularly prayed, and rightfully enforced by the superior tribunal, after an unwarranted disallowance by the inferior.

2. Whether the article in the confederation giving authority to this court as a superior tribunal in *all cases of capture*, did authorise them to receive appeals in cases circumstanced like this, was a point for them to decide ; since it was a question arising in a *case of capture*, of all which cases (without any exception) they were constituted judges in the last resort. The merits of their decision we surely cannot now enquire into, but *their authority to decide*, not being limited, there was no method, by applying to any other court, of correcting any error they might commit, if in reality they should have committed any.

3. Whether their decision was right or wrong, yet nobody can deny that the jurisdiction of the commissioners was at least doubtful ; of course the Court of Appeals found a case then depending in the former court of the commissioners, after a preliminary, but not a final, determination, for such I consider it to have been. It was therefore a cause then *sub judice*, and it being a case of capture and a question of appeal, no other court on earth, but that, in my opinion, could decide it. And no objection can be urged in this case against the authority of such a decision, or the propriety of its being final, but such as may be urged against all courts in the last resort, with respect to the merits of whose decisions there may be eternal disputes, but such disputes would be productive of eternal war, if some court had not authority to settle such questions for ever.

I, therefore, have not the smallest doubt, that the decision of | the p. 97
court in 1783, was final and conclusive as to the parties to the decree. And this point appears to me so plain, that I think it useless to take notice of any authorities quoted on either side, in relation to it, none of them, I conceive, in any manner contravening the conclusive quality of such decrees upon the principles I have stated, and some of them clearly, and beyond all question, supporting it.

The decree of *September*, 1783, being by me thus deemed final and conclusive, the next enquiry is,

Whether it was a decree which the District Court of *New-Hampshire*, or the Circuit Court of *New-Hampshire* acting specially in this cause for the legal reason alledged, had authority to enforce, either by decreeing a specific execution, or awarding damages for a non-performance of it ?

Upon this branch of the subject a few words will be sufficient. The District Court, by the act of Congress, hath the whole original jurisdiction in admiralty and maritime causes. Whatever doubt might otherwise have arisen, the decision of this court upon the writ of error from *Maryland*, last *February*, fully established, that this includes a prize jurisdiction, as well as other cases of a maritime nature. I was not present when the decision was given ; had I been so, I probably should have concurred in it, because the words, 'all civil causes of admiralty and maritime jurisdiction,' evidently include all maritime causes, whether peculiarly of admiralty jurisdiction or not ; because a question of *prize* on the high seas is clearly of a maritime nature, and therefore the *English* distinction between an *instance* (which is strictly an admiralty) court, and a *prize* court, does not apply to this case ; more especially as the District Court having as large authority given to it in all maritime causes of a civil nature, as the constitution itself prescribes. If that court does not possess such an authority, no court can be instituted with powers adequate to that purpose, so that under the present constitution, there could be no prize jurisdiction at all ; and the very tenure of all the judges (which is for good behaviour) naturally excludes the idea of a temporary and occasional establishment of any courts whatsoever. I mention these reasons, not because the authority of the case receives any additional sanction from my opinion, but because I was desirous to take so favourable an opportunity of expressing my concurrence in a decision of so much importance.[1]

It was clearly shewn at the bar, that a Court of Admiralty in one nation, can carry into effect the determination of the Court of Admiralty of another. A Court of Prize being equally grounded on the law of nations as a Court of Admiralty, and proceeding also, as that does, on the principles
p. 98 of the civil law, | must, in common reason, have the same authority. I think it was rightly observed, that the sentence consisted, in effect, of two parts, one reversing the decree, and therefore vesting a right to a restitution or a recovery in value in the appellant, the other ordering a specific restitution. If that specific redress is from any cause rendered impracticable, those who have unjustly, and upon a sentence determined to be erroneous, received the property or its value to their own use, must in justice be accountable ; otherwise *form*, which ought only to

[1] See *Glass et al. versus The Betsey et al. ant.*

be the handmaid of right, might prove its treacherous destroyer. The District Court having sole original authority in cases of this kind, must have equal power, as to such subjects, with the power possessed by this court in any case where it has original jurisdiction, with this difference only, that in the one case a writ of error is allowed, in the other not. The Court of Appeals, which passed the final decree, having expired, there seems at least as much reason for a court of similar jurisdiction as to the subject-matter, proceeding to give effect to its decisions, as there can be for a Court of Admiralty of one nation giving effect to the decision of a Court of Admiralty of another, to which perhaps it is a perfect stranger, and of which it may know little more than that they equally belong to the great family of mankind. I am therefore of opinion, that the District Court, or the Circuit Court, acting specially in this instance on account of the incapacity of the former (as the law empowered it to do) had authority to enforce the decree in question, by decreeing damages in lieu of a specific restitution, which was impracticable.

The third question is,

Whether the authority hath been exercised properly in this instance, under all the circumstances of the case ?

The material circumstances to be considered, either from facts admitted on the face of the record, or the public proceedings referred to by it, and of which we are judicially to take notice, seem to be as follow :

That the brig M'Clary was fitted out, under the authority, and pursuant to certain resolutions of Congress, in consequence of which, an act of the legislature had passed, in the state of *New Hampshire*, which complied partially with those resolutions, but made some regulations apparently intended as a restriction upon them (whatever might be their legal operation :) That on the 30th Oct. 1777, she captured the brig *Susanna* and cargo on the high seas: That the captured property was libelled in the Court Maritime of *New Hampshire*, (erected by the state law) on the 11th November, 1777 : That *Elisha Doane* (whose administrators are the defendants in error in this cause) exhibited his claim on the 1st December following ; and | on the 16th the property was condemned, p. 99
and ordered to be distributed according to law : That within five days (the time for praying an appeal prescribed by the resolutions of Congress) *Doane* prayed an appeal to Congress, which was disallowed : That he then prayed and obtained an appeal to the superior court of *New Hampshire*, agreeably to the directions of the state law, which allowed of such an appeal in cases of this kind, the act providing for an appeal to Congress, only in case of a capture by an armed vessel fitted out at the charge of the United Colonies : That on the first Tuesday in September, 1778, the superior court adjudged the property to be forfeited, and ordered it to be sold by the sheriff at public vendue for the use of the libellants ; and the

court further ordered, ' that the proceeds thereof, after deducting charges, ' should be paid to *John Penhallow* and *Jacob Treadwell*, agents for the ' owners, and to *George Wentworth* agent for the captors, *to be by the said* ' *agents paid and distributed to the persons mentioned therein*, according to ' the law of the state in that case made.'

That an appeal from this decree to Congress was prayed within five days, and disallowed : and that afterwards, in obedience to the decree, and in virtue of it, the property was sold, and distributed to those entitled under the decree ; and the proportionate shares (upon the supposition of a lawful capture) are admitted to have rightly been, one half to the owners, and the other half to the officers, mariners, and seamen.

That an application was afterwards made to the commissioners for hearing appeals under the authority of Congress ; and after due notice to the libellants in the original suit, who appeared and pleaded to the jurisdiction, stating not only the defect of the authority of the court to sustain the appeal under any circumstances, but also special reasons why the Appellant was not entitled to the benefit of an appeal under the circumstances of the case (viz. the Appellant's waving the benefit of his appeal to Congress, by taking an actual appeal to the superior court of *New-Hampshire* ; that the appeal first demanded, was not prosecuted for more than forty days ; and that by the resolution of Congress, no appeal should be had from the verdict of a jury, but only the sentence of the judge). The commissioners, on the 26th *June*, 1779, decreed that they had jurisdiction, but declined any further proceedings at that time in the cause, for a reason they alledge.

That on the 12th *September* 1783, this case again came before the court of appeals, established under the articles of confederation ; which, after a full hearing and solemn argument by the advocates on both sides, passed a definitive decree in these words, viz. |

p. 100 ' It is hereby considered, and finally adjudged and decreed by this ' court, that the sentences or decrees passed by the inferior and superior ' courts of judicature for the county of *Rockingham*, in the above cause, ' so far as the same have relation to the property specified in the claims ' of *Elisha Doane*, *Isaiah Doane*, and *James Shepherd*, be, and the same ' are hereby revoked, reversed, and annulled, and that the said property ' specified in the said claims, be restored to the said claimants respectively ; ' and it is hereby ordered, that the parties to the appeal each pay their ' own costs, which have accrued in the prosecution of the said appeal in ' this court.'

In this case considerable difficulty has arisen from the peculiar manner of pleading, which is said to be warranted by local practice, but which certainly has very much contributed to embarrass the question in the cause. There is neither a complete demurrer, nor, I conceive, a regular

issue ; and it may be deemed doubtful, whether what is termed a plea, ought to be considered as a plea or an answer. I had, therefore, at first strong doubts whether there was sufficient matter before us to ground a final decree : But upon reflection it seems to me, that as the case has been argued on both sides, upon a supposition that a final decree could be made ; as there has been no application on either, for the examination of testimony, but the hearing took place without objection upon the pleadings as they stand, and consequently, we can regard the facts, only as stated on the record ; as an express consent that the cause should be decided on this footing, would undoubtedly have been binding, and the circumstances in this case evidently prove an implied one ; I think the pleadings as they stand, will afford sufficient foundation for a decree, especially according to those principles of practice, which we are told prevail in the state from which this record comes—a practice which, until altered, we undoubtedly ought to pursue, when it is not substantially inconsistent with justice.

Several objections have been offered (admitting the validity of the final decree, in respect to the authority of the court upon the points then before them) which I will consider in the best manner in my power.—

I. It is objected that the Appellant *Doane* was dead, before the final decision which was given in *September*, 1783 ; and this it is alledged, though not appearing on the face of the record, does appear from the letters of administration produced by the libellants, which letters are dated in *February* 1783.

Admitting that the courts are bound to inspect the date of the letters, and to regard that date as conclusive, and to infer the fact accordingly from it ; several answers have been given to this objection ; either of which, if valid, is decisive. |

1. That the proceeding in question was a proceeding *in rem*, and upon p. 101
such proceeding in civil law courts, the death of a party does not abate. I incline to think the law is so, but as my opinion is clear on other points in answer to the objection, I avoid giving an opinion on this.

2. That admitting the decree for this cause to be erroneous, it can only be avoided by a solemn proceeding in the nature of a proceeding in error, and cannot be enquired into in this collateral way.

Upon this point I am clear, that the decree was not rendered absolutely void, but must stand regularly good till reversed for this error, if it be one. So the matter stood while the court of appeals was in being. If the Appellees could have avoided the decree for this error, they might have applied to that court to have reviewed its decree upon this suggestion. The expiration of the court is no reason why the law in this particular should be considered as changed. It is true, in many cases where there has been error in a suit, and this has affected the right of a person not

a party, this error has been admitted to be shewn in a suit where the point came collaterally in question. But it has never been permitted to a party who might have set aside the original judgment for error. I speak now of proceedings at common law. The same reason, I think, applies in this case. It does, indeed, seem reasonable, that if one party can proceed in the District Court to enforce the decree, the other party may to impeach it. But then this ought to be done in the same mode as in the other court, and that for a very substantial reason : Because, when that suggestion is the sole ground of enquiry, the other party may come prepared to shew many things to do away its force. He may (for aught I know) be permitted to shew a mistake in the date of the letters. He may shew an actual knowledge of the fact by the other party previous to the decree, and an acquiescence in it. He may possibly shew that the administrators were in fact before the court, though this does not appear on the face of the proceedings. As the enquiry in this case is into a fact, perhaps any thing of this kind may be shewn, and, if so, there surely ought to be an opportunity of doing it.

3. There seems great reason in what was alledged at the bar, that though it might have been competent for the administrators, had the decree been against *Doane*, to have shewn this fact for error, because neither the principal nor they had any opportunity of supporting their right before the court, when the decree was given, the former being dead, and the latter not being called upon, yet that it is not competent for the Appellees, who were before the court, were heard, and cannot alledge (had that been the fact) that *they* had sustained any prejudice by their being heard *ex parte.* |

p. 102 It is a rule at common law (the reason applies in equity and other civil law cases) that if a party can plead a fact, material to his defence, and omits to do it at the proper time, he can never avail himself of it afterwards.

They had a day in court to plead the death of the Appellant. If they say they did not know of it, the same might be alledged in any case at common law, where we know it will not avail. The law rather chuses that a party should incur a risque of this nature, than leave a door open to endless litigation upon pretences, the truth of which it is very difficult to discover.

4. This is an error in fact, and, in my opinion, it was a powerful argument, that if we cannot reverse a decree even of a District or Circuit Court for any *error in fact*, we have no ground to set aside the solemn and final decree of a court that has expired, for such an error. The argument, in my opinion, is altogether *a fortiori.*

II. The death of *Doane* has been alledged for another purpose.

It is said, that the decree is to restore to *Elisha Doane*, which was

impossible, because *Elisha Doane* was not then in being. Admitting that upon this record we are to take judicial notice that *Doane* was dead at the time of pronouncing the decree (in which I am by no means clear) yet if this was the real reason why the Plaintiffs in error had withheld the property or its proceeds, they might themselves have said so. They have not, and as each party generally makes the best of his own case, we are to presume that did not in fact constitute their reason. In this case it could be of no avail, but at the utmost to prevent the allowance of interest until a demand actually made. It never could destroy the whole beneficial effect of a decree given *in rem*, and when the parties who make the objection were in court, and parties to the very decree complained of. I think nothing can be more evident, than that if the decree be not totally void, the administrators are entitled to the benefit of it, at least until it is set aside for error, if there be any error in it, and such a remedy is now practicable. If a *scire facias* was necessary before execution could have been obtained out of the court which passed the decree, it could be for no other reason than that the other party might have an opportunity to contest the validity of the letters, and the existence of the administration, if any such objection could be supported. Such an objection might have been made here. It has not been made. There is, therefore, I conceive, no principle of law or justice which forbids giving effect to the decree upon this ground. |

III. Another objection is, that the cause was not regularly brought p. 103
up to the Court of Appeals, and proceeded on, agreeably to the resolutions of Congress.

There does not appear any ground for this objection in point of fact. But I am clear that this is a point not now enquirable into. When a court has final and exclusive jurisdiction in a case, and has pronounced a solemn judgment, every other court must presume that all their previous proceedings were right, of which indeed they were the only competent judges.

IV. It is alledged, damages were not prayed for by the libel. It is a sufficient answer, that there is a prayer for general relief. And so little do I think of this objection, and so much of the duty of a court, unaided by formal applications, where there is a substantial one, that I am strongly induced to think, if a case proper for a specific relief was laid before a civil law court, and the direct contrary to the proper relief was prayed for, yet the court even in this case would be justified in granting the relief that might be properly afforded, if the party who had committed the mistake consented to it: without that indeed it might be improper, for no court ought to force a benefit on a party unwilling to receive it.

These objections being all got over, which were urged against any

relief whatsoever, it is necessary to consider the particular objections against the relief actually afforded. And here, I think, very formidable objections occur.

I think the decree erroneous in these particulars:

1. In decreeing interest for the time previous to the date of the decree in 1783.

2. In granting full damages against all the parties, without distinguishing between the owners to whom one half was distributed, and the agent who received the other half for the benefit of the officers, mariners and seamen.

3. In making *George Wentworth*, the agent, personally liable for any part.

1. As to the first point, as this libel proceeds only, and can be supported, as I conceive, upon no other ground, upon the principle of enforcing the decree of *September* 1783, so that the Libellants might recover such benefit from it as the nature of the case could admit, their case is not to be made better or worse, as to the original right, than as the Court of Appeals decided it.

The Court of Appeals might have decreed satisfaction for detention, but did not. They did not even decree costs, but ordered each party to pay his own costs. These things were altogether discretionary in the court. That was the proper court to judge, whether any damages should be allowed for detention. If the decree is to be final and conclusive as to the |
p. 104 subject matter, it must be so as completely in respect to the detention, which formed one part of the case, as to the restoration, which formed the principal object of it.

I should indeed have had some doubts as to the subsequent interest, had it appeared that the Defendants had been unable to comply substantially with the decree, owing to the death of *Doane*, and the want, (had that been the case) of a subsequent demand by the Administrators. But as that is not alledged, and they set up their whole defence upon the point of right, merely, we are not to presume, that those circumstances (if the Administrators did not make a demand, with respect to which nothing appears) had any weight in inducing their non-compliance with the decree.

2. I am of opinion, that damages against all the Defendants jointly, ought not to have been given. We are to look at substance, not form. There were, in effect, two decrees originally, one half of the value of the property to one party, the other half to another. The reversal of the decree ought to affect the decree itself, in the manner in which it was given. Consequently, each party ought only to be required to restore what he was adjudged to receive. The case of joint trespasses stated at the bar, does, in my opinion, by no means apply. The privateer in question, had

a lawful commission. In the execution of such an authority, difficulties often arise. Where they happen, *bona fide*, the master is considered in no fault, and neither he nor his owners made accountable, even in case of a mistaken seizure, but for restoration, and, at the utmost, costs. In case of gross misbehaviour, not only costs, but damages will be allowed by the court of prize. It seems now to be settled that they have exclusive jurisdiction on all such subjects. As not even costs were allowed in this case, we are to infer that the seizure was *prima facie* innocent ; consequently, if a principle of the common law, deemed by many highly rigorous, and founded, perhaps, rather on the forms of proceeding, than on strict justice, if those forms did not interfere, could be applied to a case arising in a court, not only authorised, but bound to distinguish between a mere mistake, and a wanton abuse of power, there is no foundation for such an application, in fact, in the present instance.

As owners are, in all instances, made jointly liable *ex contractu*, and their respective shares are matters of private cognizance, so that they, in all instances, appear jointly before the court, and a payment to one owner is, in law, a payment to all ; I can discover no principle, upon which any discrimination could be properly made in this case, in regard to the different interests and actual receipts of the owners. I think, therefore, the decree in regard to one moiety, ought to be jointly against all the owners. |

3. The third error in the decree, in my opinion, is, making *George Wentworth*, the agent, liable for any part. I have had considerable doubts on this subject, but upon the fullest consideration I have been able to bestow on it, I think he is not liable. Had he held any of the property, at the time of the decree of the Court of Appeals, he would have been undoubtedly liable. Had he any now, or any of the proceeds in his hands, he would also be liable. Perhaps he might, had he held any of the property or proceeds, after actual notice of the Court of Appeals taking cognizance of this case. Neither of these facts appears on the face of the record, and as they are of importance, and neither is asserted, neither is to be presumed. The contrary, indeed, may be fairly inferred from the statement on the record, and has been candidly acknowledged to be the real truth. He therefore appears in the character of a mere agent, acting avowedly for the benefit of others, and not for his own ; and as he had paid away the money in virtue of a decree of a court, having *prima facie* authority for the time, to decide whether an appeal did, or did not lie ; I think he ought not to be ordered to refund. It is alledged that the prayer of an appeal, in a case where an appeal lies, *ipso facto*, suspends the proceedings, and all afterwards is *coram non judice*. I cannot admit the doctrine in that extent. Where there are inferior and superior jurisdictions, and an appeal is allowed from the former to the latter, and it is the express duty of the

p. 105

party praying an appeal, to apply in the first instance, to the inferior court (as I conceive it was in this case under the resolutions of Congress, which directed an appeal to be prayed for within five days, and security to be taken) I must presume that that court is *prima facie* to judge whether it is applied for in a proper manner, and whether all the requisites previous to his being fully entitled to it, are complied with. If the court decides in any of these particulars erroneously, it would be absurd to say, that the party should lose the benefit of his appeal, but, in my opinion, it would be equally unjust to hold, that a party who obeyed the decree of a court, over whom he had no controul, should suffer by his respect to the law, which constituted that court, and which must therefore mean to support its decisions, in a cause coming within its jurisdiction, while they remain uncontrouled by any superior tribunal. It was shewn, that an inhibition, in cases of this kind, sometimes at least issues to forbid the court's further proceeding. Can there be a stronger proof, that the court had authority *de facto* (whatever may be said as to its authority *de jure*) without that interposition! The law never does a nugatory act, and therefore, I presume, would not forbid the doing of a thing, which if done, is totally and absolutely void. It was said, this was to bring the judge
p. 106 into contempt. | But if the conduct of the judge who is bound to know his jurisdiction is in the mean time innocent, surely an obedience to him by a party, who is not to be presumed capable of deciding on the jurisdiction by his own judgment, must be so. *George Wentworth*, on the face of the whole proceedings, was a mere *agent*, an attorney *in fact*, and for aught I can see, as little liable to refund in a case of this sort, as any attorney, in fact, or even an attorney at law, to whom money had been paid under a judgment or decree, and who had paid it away to his client. An agent in cases of this kind, is allowed by law. They are recognized, I believe, in all *prize acts*. Mariners, whose employment is on the sea, cannot be required without injustice to attend their cases in person. In cases of privateers, the captors are so numerous that the employment of one or more agents on shore, seems unavoidable. The law, when it allows a benefit, never intends that it shall be imperfectly enjoyed; therefore in allowing privateering, it allows *agents*. These I consider as *nominal* parties, and that the real parties are their principals. Now I will suppose that in a common law case an infant sues in a personal action by his guardian, and obtains a judgment; the guardian receives the money, and pays it to the infant after he comes of age. The judgment is afterwards reversed. Can the guardian ever be made to refund to the defendant, or must the person who was the infant do it? This case appears to me a very parallel one in all its circumstances. The infant cannot act for himself, and therefore is allowed to act by his guardian. The law takes notice, by allowing agents, that persons concerned in privateers, at least, cannot do well

without them. The guardian is nominally a party ; so is the agent : but the infant, in the one case, and the principals, in the other, are the real parties. The guardian is accountable to the infant, for money he received for him : so is the agent to the principal, for money he receives. There is, that I can imagine, but one difference, that can be suggested between them ; that in the one case, the judgment is good till reversed ; and, therefore, all lawful acts intermediately done, are valid. But the disallowance of the appeal, is said to be a nullity, and all subsequent proceedings in that court are void. I admit the consequence, if the law be so. But I have already stated reasons, why I think it is otherwise. A court of justice, indeed, ought at its peril to take notice of its own jurisdiction, and it is not often that cases of such doubt arise, that a Judge can be at a loss on the subject. But it may happen, and does sometimes happen, that innocent and serious doubts, are really entertained. Is a court, therefore, because its judgments may be finally dissented from, by a superior tribunal, to be considered as flying in the face of the law, so that parties before it, shall not | only be protected in disobeying it, but punished p. 107
for their obedience ? If this be the case, the old maxim, *cedunt arma togæ*, will very ill apply to Courts of Justice. Instead of being the peaceful arbiters of right, and the sacred asylum of unprotected innocence, their very *forums* will be the seat of war and confusion. I admit, indeed, where there is a conflict of jurisdiction, and the party entitled to a decree, is prohibited from obeying it, by a power claiming a superior cognizance, he must at his peril obey one or the other ; but this arises from the absolute necessity of the case, because, whether the one or the other be right or wrong, must depend on a subsequent decision. In this case, *George Wentworth*, before the distribution, received no monition, or any other process from the tribunal alledged to be superior. He could not even be certain that the Appellants would carry their application further. I consider him, therefore, justifiable in obeying the decree, which at the time, was compulsory upon him, and for a disobedience to which, he might have been committed for a contempt, according to the opinion of the court which pronounced it. The parties still have their remedy against those who actually received the money, or their representatives, if they can be found. They may perhaps be entitled to a remedy under the bond given, when the commission of the privateer was granted. If either of these remedies be difficult or inefficient, that does not make *George Wentworth*, in point of law, more liable than if they were perfectly easy, and clearly effectual. It will be one melancholy instance, in addition to a thousand others, of the distress incident to a doubtful and imperfect system of jurisprudence, which has been since happily changed for one so precise and so comprehensive, as to leave little room for such painful and destructive questions hereafter.

The 4th question is,

Whether this court can now rectify the decree in respect to the parts of it considered to be erroneous, or must affirm or reverse in the whole.

The latter is certainly the general method at common law, and it has been contended, that as this proceeding is on a writ of error, it must have all the incidents of a writ of error at common law. The argument would be conclusive, if this was a common law proceeding, but as it is not, I do not conceive, that it necessarily applies. An incident to one subject cannot be presumed, by the very name of such an incident, to be intended to apply to a subject totally different. I presume the term, ' writ of error,' was made use of, because we are prohibited from reviewing facts, and therefore must be confined to the errors on the record. But as this is a civil law proceeding, I conceive the word ' error ' must be applied to such
p. 108 errors | as are deemed such, by the principles of the civil law, and that in rectifying the error, we must proceed according to those principles. In a civil law court, I believe, it is the constant practice to modify a decree upon an appeal, as the justice of the case requires ; and in this instance, it appears to me, under the 24th section of the judicial act, we are to render such a decree as, in our opinion, the District Court ought to have rendered. If this was a case, wherein damages were uncertain, and wherein for that reason, the cause should be remanded for a final decision, (which it does not appear to be, because the Libellants in the original suit had a decree in their favour, which is now to be affirmed in part) yet the damages here are not uncertain, because we all agree, that interest ought to be allowed from the date of the decree, in *September*, 1783, upon the value of the property, as specified in the report, against those who are to be adjudged to pay the principal.

Upon the whole, my opinion is, that the decree be affirmed in respect to the recovery of the Libellants, in the original action against all the Defendants but *George Wentworth* ; that the libel against him, be adjudged to be dismissed ; but that there be recovered against the other Defendants in the original action, the value of the property they received, as ascertained in the Circuit Court, with interest from the 17th of *September*, 1783.

I am also of opinion, that the respective parties should pay their own costs.

BLAIR, *Justice*. When this cause came before me, at *Exeter*, in *New Hampshire*, I felt myself in a delicate situation, in having a cause of such magnitude, and at the same time, of such novelty and difficulty, as to have drawn the judgment of men of eminence, different ways, brought before me for my single decision. It was, however, a consolation to know, that whatever that decision might be, it was not intended to be final, and I can truly say, it will give me pleasure to have any errors I may have committed, corrected in this court. Two points, and if I mistake not, only

two, were brought before me : The first, whether under the description of Admiralty and Maritime jurisdiction, the judiciary bill gave to the District Court any jurisdiction concerning prizes, I decided in the affirmative ; and the same decision having been afterwards made in this court, in the case of *Glass*, and others, I consider that as now settled. The other point, was, whether the Court of Appeals, erected by Congress, had authority to reverse the sentences given in the Courts of Admiralty of the several States ; and the source of the objection upon this point, was the defect of authority in the Congress itself. Here, also, my sentence affirmed the jurisdiction.

I have attended as diligently, and as impartially as I could, | to the p. 109
arguments of the gentlemen, upon the present occasion, to discover, if possible, how I may have been led astray, in the decision of this question ; but as the impressions which my mind first received, continue uneffaced, (whether through the force of truth, or from the difficulty of changing opinions, once deliberately formed) I will repeat here the opinion which I delivered in the Circuit Court, as the best method I can take for explaining the reasons upon which it was founded. I would premise, however, that it contains something relative to what had been said at the bar of the Circuit Court, but which I believe was not mentioned on this occasion.

' The immediate question is, whether Congress had a right to exercise, by themselves, by their committees, or by any regular court of Appeals by them erected, an appellate jurisdiction, to affirm or reverse a sentence of a state court of Admiralty, in a question whether prize or no prize. If they possessed such an authority, it must be derivative, and its source either mediately or immediately the will of the people ; usurpation can give no right. The respondents contend they had no such authority, till the completion of the Confederation in 1781, but only a recommendatory power ; the Libellants insist, that Congress was considered as the sovereign power of war and peace, respecting *Great-Britain*, and that to that power is necessarily incident that of carrying on war in a regular way, of raising armies, making regulations for their discipline and government, commissioning officers, equipping fleets, granting letters of marque and reprisal, the power (now contested) of deciding, in all cases of capture, questions whether prize or not, and every power necessarily incident to a state of war. It is, at least, certain, that the political situation of the American Colonies, required a union of council and of force, by wise measures to bring about, if possible, a reconciliation with the mother-country, on a basis of freedom and security, or, if this should fail, by vigorous measures to defeat the designs of their tyrannical invaders ; and although this alone cannot suffice for an investiture in Congress, of the powers necessary to that end, yet if the powers given be delegated in terms large enough to comprehend this extent of authority, but which may also be satisfied by

a more limited construction, the supposed necessity for such powers given to a federal head (and the counsel for the respondents have admitted that it would have been good policy) is no contemptible argument for supposing it actually given. In the beginning of the year 1775, our affairs were drawing fast to a crisis, and for some time before the battle of *Lexington*, a state of warfare must in the minds of all men have been an expected event. Some of the delegations (I think three) of members to the Congress
p. 110 which met in *May* of that year, | contain nothing but simple powers to meet Congress; the rest expressly give authority to their delegates to consent to all such further measures, as they and the said Congress shall think necessary, for obtaining a redress of *American* grievances, and a security of their rights. It is not in all of them worded alike, but in substance, that seems to be the sense. Every thing which may be deemed necessary! I think it cannot well be supposed, that in such a delegation of authority, at such a time, there was not an eye to war, if that should become necessary. But it is objected, that at most, no greater power was given to Congress than to enter into a definitive war with *Great-Britain*, not the right of war and peace generally; and even that war, till the declaration of independence, would be only a civil war. But why is not a definitive war against *Great-Britain* (call it if you will a civil war) to be conducted on the same principles as any other: If it was a civil war, still we do not allow it to have been a rebellion—*America* resisted and became thereby engaged in what she deemed a just war. It was not the war of a lawless banditti, but of freemen fighting for their dearest rights, and of men lovers of order and good government. Was it not as necessary in such a war, as in any between contending nations, that the law of nations should be observed, and that those who had the conducting of it, should be armed with every authority for preventing injuries to neutral powers, and their subjects, and even cruelty to the enemy? The power supposed to have been given to Congress, being confined to a definitive war against *Great-Britain*, and not extending to the rights of peace and war generally, appears to me to make no material difference; still the same necessity recurs, of confining the evil of the war to the enemy against whom it is waged. Till a formal declaration of independence the people of the Colonies are said to have continued subjects to *Great-Britain*; true, and that circumstance it is, which denominates the war a civil war, as to which I have already stated how, in my mind, the question is affected by that circumstance. But it was asked whether, if during the war, *Great-Britain*, at any time before the declaration of independence, had declared war against any nation of Europe, that nation would not have had a right to treat *America* with hostility as being subject to *Great-Britain*? According to this supposition, *Great-Britain* might have had some temptation to declare such war that she might have the co-operation of her enemy, to reduce

her colonies to obedience. But *Great-Britain* was too wise to adopt such a policy; she knew that by her engaging in such a war, the colonies, instead of finding a new enemy to oppose, would have known where to find a friend; they might have formed an alliance with such a power, who probably would have considered it as an acquisition, | and Congress might p. 111
have been the sooner encouraged to separate from *Great-Britain*, by a formal declaration of independence. As the supposition that Congress was invested with all the rights of war, in respect to *Great-Britain*, is of great moment in the present cause, and as the power may not be so satisfactorily conveyed by the instructions to the several delegates as might be wished, partly because some of them did not exhibit farther instructions than to attend Congress, and partly because the instructions given to the rest, may be satisfied by a different construction, it may be proper to consider the manner in which Congress, by their proceedings, appear to have considered their powers; not that by any thing of this sort, they had a right to extend their authority to the desired point, if it was not given, but because in shewing by such means, their sense of the extent of their power, they gave an opportunity to their constituents to express their disapprobation, if they conceived Congress to have usurped power, or by their co-operation to confirm the construction of Congress; which would be as legitimate a source of authority, as if it had been given at first. If they were only a mere council, to unite by their advice and recommendation all the States in the same common measures (which, by the by, if not uniformly pursued, might be disappointed) then the several members might be justly compared to ambassadors met in a Congress, and could only report their proceedings for the ratification of their principals; but Congress resolved to put the colonies in a state of defence; they raised an army, they appointed a commander in chief, with other general and field officers; they modelled the army, disposed of the troops, emitted bills of credit, pledged the confederated colonies for the redemption of them, and in short, acted in all respects like a body completely armed with all the powers of war; and at all this I find not the least symptom of discontent among all the confederated states, or the whole people of *America*; on the contrary, Congress were universally revered, and looked up to as our political fathers, and the saviours of their country. But if Congress possessed the right of war, they had also authority to equip a naval force; they did so, and exercised the same authority over it, as they had done over the army; they passed a resolution for permitting the inhabitants of the colonies to fit out armed vessels to cruize against the enemies of *America*; directed what vessels should be subject to capture, and prescribed a rule of distribution of prizes, together with a form of commission, and instructions to the commanders of private ships of war: they directed that the general assemblies, conventions, and councils or committees of

safety of the United Colonies, should be supplied with blank commissions,
p. 112 signed by the President of Congress, | to be by them filled up, and delivered to any person intending to fit out private ships of war, on his executing a bond, forms of which were to be sent with the commissions, and the bonds to be returned to Congress. These bonds are given to the President of Congress, in trust for the use of the United Colonies, with condition to conform to the commission and instructions. The commission, under which the Captain of the respondents acted, was one of these commissions, it seems, only this is attempted to be qualified by saying that it was countersigned by the Governor of *New Hampshire* ; but this circumstance seems to me to be of no importance. Whoever has the right of commissioning and instructing, must certainly have the right of examining and controuling, of confirming or annulling the acts of him who accepts the commission, and acts under it. And this exercise of authority in granting commissions seems to have had the special sanction of the several colonies, as they filled up the commissions, took the bonds, and transmitted them to Congress. It was urged in the course of the argument, that if Congress did enjoy the power contended for, the confederation, which was a thing of such long and anxious expectation, was not of any consequence ; but it is to be observed, that that instrument contained some important powers which could not be derived from the right of war and peace ; it was of importance also, as a confirmation of the powers claimed as necessarily incident to war, because some of the states appeared not to be sensible of, nor to have acknowledged such incidency ; and yet the power may have existed before. It is true, *that* instrument is worded in a manner, on which some stress has been laid, that the several States should *retain* their sovereignties, and all powers not thereby expressly delegated to Congress, as if they were, till the ratification of that compact, in possession of all the powers thereby delegated ; but it seems to me, that it would be going too far, from a single expression, used perhaps in a loose sense, to draw an inference so contrary to a known fact, to wit, that Congress was, with the approbation of the states, in possession of some of the powers there mentioned, which yet, if the word ' retain ' be taken in so strict a sense, it must be supposed they never had. I take the truth to be, that the framers of that instrument were contemplating what powers Congress ought to have had at the beginning ; and that in reference to the first occasion of their assembling to oppose the tyranny of Great Britain, at least in reference to the time of framing the confederation, say, the states shall *retain*. But however that may be, as I said before, I think it is laying too great a stress upon a single word, to contradict some things which were evidently true.

p. 113 ' But it was said that *New Hampshire* had a right to revoke | any authority she may have consented to give to Congress, and that by her

acts of assembly she did in fact revoke it, if it were ever given. To this a very satisfactory answer was made: if she had such a right, there was but one way of exercising it, that is, by withdrawing herself from the confederacy; while she continued a member, and had representatives in Congress, she was certainly bound by the acts of Congress. I am therefore of opinion that those acts of *New Hampshire*, which restrain the jurisdiction of Congress, being contrary to the legitimate powers of Congress, can have no binding force, and that under the authority of Congress an appeal will lay from the Courts of Admiralty of that State, to the Court of Commissioners of Appeals. That Court has already affirmed their jurisdiction in this particular case, upon a plea put in against it; and upon that account, also, I incline to think that this court, not being a court of superior authority, ought not to call it in question. Under these impressions, I must, of course, decree (whatever may be the hardship of the case) that the Respondents, pay to the Libellants, their damages and costs, occasioned by not complying with the decree of the Court of Appeals, the quantum of which to be ascertained by Commissioners.'

If the reasoning upon which I went, in pronouncing the above decree, in favour of the jurisdiction of the Court of Appeals, be unsound, and if the decree stand in need of some better support, it will probably find it in the confederation, by which authority is given to Congress, to erect Courts of Appeal in all cases; and from that time the authority of the court of Appeals is confessed; the present case was then depending before that court, they asserted their jurisdiction, and gave a final decree. As to the objection, that previously to the confederation, Congress were themselves sensible, that they did not possess supreme Admiralty jurisdiction, because of their *recommending* to the several States, that they should erect Courts of Admiralty, for the trial of prizes, with appeal to Congress, I see not how such recommendations can prove any thing of the kind; for Congress might have authority to establish such courts in the respective States, when yet they chose only to recommend to the states to do it. But admitting the authority of the Court of Appeals, and the propriety of applying to the District Court of *New Hampshire*, to inforce that decree in the way of damages, for not restoring the vessel and cargo, when through the disobedience of the present Plaintiffs in error, specific restitution was become impossible, yet if any thing erroneous can be found in the decree of the Circuit Court, it is the duty of this court to correct it. It is objected, that the damages allowed, were too high, including interest on the appreciation | of the *Susanna* and her cargo, from so remote a period as the sale of the p. 114
vessel and cargo.

That *George Wentworth*, being a mere agent, and having distributed among those who were entitled, under the decrees of the Courts of

Admiralty of *New Hampshire*, all the money by him received for their use, ought not to have been subjected by the decree of the Circuit Court, to the repayment of that money.

And that a lumping decree, subjecting the Respondents indiscriminately, to the payment of all the damages, although their interests were several and distinct, was also erroneous.

It does not, indeed, appear to me, that the decree is for the payment of too large a sum, the damages having been swelled by interest, calculated upon the appraised value of the *Susanna*, her apparel, and of her cargo, from so remote a period. The decree of the Court of Appeals was merely for restitution, and that the Appellants should be placed at that time in the same situation as they were in, previous to the capture. A compensation for the loss they sustained in being in the mean time deprived of their property, was not provided for in the decree, nor were even costs allowed. The libel in the Circuit Court being bottomed on the decree of reversal, sought only a compensation in damages equivalent to a restitution at the time of the reversal; Interest, therefore, ought, I think, to have been allowed only from that time.

George Wentworth, it is true, was not concerned in interest; he represented the interest of the officers and seamen, but had none himself; and a mere agent who has paid away all, or any part of the money by him received in that character, without having been by a monition notified of the appeal, will be allowed credit in his account for the money so paid away. But *George Wentworth* appears, I think, in another character besides that of an agent: he was a party libellant, as such he knew that the Claimants were dissatisfied with the decrees of the Admiralty Courts of *New Hampshire*, having prayed an appeal to Congress, and offered the requisite security; and when the petition of appeal was referred to the Court of Commissioners, and they directed notice to be given to the parties, who appeared before that court, it seems evident that they had notice. What then is the effect of this? Was any thing further necessary to suspend the decrees of the State Courts? An inhibition is, indeed, worded in a manner naturally leading to the supposition, that that instrument was necessary to effect a suspension; but this, I think, cannot be the case; for, it is observable, that by the practice, an interval of three months is allowed before the inhibition is sued out, in which time, if nothing had
p. 115 antecedently suspended the sentence, it might be carried | into complete effect, and every body be justified in their conduct, as paying obedience to a decree continuing in full force. The inhibition may be intended only as a more formal direction to cease farther proceedings, when yet they may have been inhibited before: it has a farther use also, for it appoints a day for the attendance of the parties. Conformably to this idea, it is said, in *Domat*, that the appeal suspends the decree. But a distinction is

attempted here ; it is admitted that an appeal allowed by the inferior court, suspends, while an appeal received by a superior court, is denied to have that effect. But according to *Domat*, it works a suspension, even against the will of the inferior Judge ; and it would be very strange, if the suspending operation of an appeal, to a Judge who has an authority to reverse, should depend upon the consent of the inferior Judge. But if the sentences of the State Courts were indeed suspended, no person had authority to act under them ; and if any do, he takes upon himself the consequences. Besides, if *George Wentworth* had innocently and without notice, distributed the money which came to his hands, should not this have been shewn to the Court of Appeals ? If that had been done, perhaps after reversing the decrees of the State Court, instead of decreeing restitution, they might have only decreed that the owners should pay to the Appellants, the moiety of the sales by them received. But they have decreed restitution specifically ; and if this court should so model the decree of the Circuit Court, as to exonerate Mr. *Wentworth*, as to the moiety of the money by him received, it will substantially alter the decree of the Court of Appeals ; and yet we say, that the decree now is to be bottomed on that of the Court of Appeals, which is now to be supposed right ; and that for that reason it was erroneous in the Circuit Court, to carry interest farther back than from the period of reversal, and in this way give damages, which were not intended by the Court of Appeals.

The decree of the Circuit Court, appears now, I confess, to be wrong, in that it subjects all the Defendants, indiscriminately, to the payment of all the damages. In the original libel, they had indeed joined, but it was in right of several interests, which I think ought to have been distinguished in the decree ; justice obviously requires this ; so obviously, that it is enough to state the case to obtain the mind's assent to the propriety of distributive damages, instead of those which the decree contemplates. I will only say further, that I have no remembrance of having had this point brought to my view at the Circuit Court, and it certainly did not occur to myself ; but if any thing was said upon the point, and I, with deliberation, then preferred the decree as it stands, I am clearly now, of a different opinion. Upon the whole, I think the decree of the | Circuit p. 116
Court will stand as it ought, when corrected by reducing the damages in the manner proposed, and when so reduced, by proportioning them among the then Defendants, according to their distinct interests.

CUSHING, *Justice.* The facts of this case being already fully stated by the court, I shall go on to enquire, whether the decree of the Circuit Court ought to be reversed, for any of the errors assigned.

The first is, that the Court of Appeals, which made the decree of restoration, had not jurisdiction of the cause.

In answer to this, I concur with the rest of the court, that the Court of

Appeals, being a court under the confederation of 1781, of all the states, and being a court for '*determining finally, appeals in all cases of capture,*' and so being the highest court, the dernier resort in all such cases, their decision upon the jurisdiction and upon the merits of the cause, having heard the parties by their council, must be final and conclusive, to this, and all other courts : to this, as a Court of Admiralty, because it is a court of the same kind, as far as relates to prize, and without any controuling or revisionary powers over it ; to this as a court of common law, because it is entirely a prize-matter, and not of common law cognizance. The cases, therefore, cited to shew, that the common law is of general jurisdiction, and that the court of King's bench, prohibits, controuls, and keeps within their line, Admiralty Courts, Spiritual Courts, and other courts of a special, limited jurisdiction, do not, I conceive, touch this case.

It is conceded by all, that the decision of a court competent is final and binding. Now, if the Court of Appeals was, under the confederation of all the states, a court constituted '*for determining finally appeals in all cases of capture,*' it was a court competent ; and they have decided. Again ; the Admiralty of *England* gives credence and force to the decisions of foreign courts of Admiralty ; why not equal reason here ?

It is true, the courts of common law there, will not allow a greater latitude to the jurisdiction of foreign courts of Admiralty, than to their own ; as it seems natural and reasonable, they should not ; for instance, holding plea of a contract made entirely at land, which seems to have been the substantial ground of a prohibition, in the case cited, respecting the decree in Spain.

If the decree of the court of Appeals must be considered as binding, as it must, or there may never be an end to this controversy ; that will carry an answer to several other errors assigned, viz. the third, fifth, and seventh, respecting the cause not being regularly before Congress or the court, and
p. 117 respecting the Circuit Court not entering into the merits—and to | some other particular exceptions ; as, that appealing to the Superior Court of *New-Hampshire*, was a waver of the right of appeal to Congress : If that appeal was consistent with the resolve of Congress, which only provided an appeal to Congress in the last resort, it was not a waver. Again, it is said, there ought to have been a jury at the Court of Appeals ; but that, clearly, was not the intent of the resolve of Congress, nor of the Confederation, nor correspondent to the proceedings in courts of Admiralty, even where trials by jury are used and accustomed in other matters ; nor was it thought a proper or necessary provision in the present constitution, which has been adopted by the people of the *United States*.

As to the original question of the powers of Congress, respecting captures, much has been well and eloquently said on both sides. I have no doubt of the sovereignty of the states, saving the powers delegated to

Congress, being such as were, '*proper and necessary*' to carry on, unitedly, the common defence in the open war, that was waged against this country, and in support of their liberties to the end of the contest.

But, as has been said, I conceive we are concluded upon that point, by a final decision heretofore made.

The 2d exception in error is, that the sentence of the Court of Appeals was void by the death of Mr. *Doane*.

That fact does not appear upon the record of the Court of Appeals, and I think we cannot reverse the decree in this incidental way, if it could be done upon a writ of error. If it was pleadable in abatement, it ought to have been pleaded or suggested there by the opposite party.

On the contrary, it is implied by the record, that *Doane* was alive; otherwise he could not have been heard by his council as the record sets forth; for a dead man could not have council or attorney. On the other hand, the letters of administration imply that he was dead at the time; but those letters were not before the court, and therefore could not be a ground for their abating the suit, if it was abateable at all for such a cause. Here seems to be record against record, as far as implications go, and I take it to be an error in fact, for which, by the judicial act, there is to be no reversal. Upon this head, a case in Sir *Thos. Raymond*, is cited by the council for the Plaintiff in error, of trover by five plaintiffs—one dies—the rest proceed to verdict and judgment—and adjudged error, because every man is to recover according to the right he has at the time of bringing the action; and here each one was not, at the time of bringing the action, entitled to so much as at the death of one of the plaintiffs.

But a case in *Chancery Cases, p.* 122, is more in point—where money was made payable by the decree to a man that | was dead, and yet adjudged, p. 118
among other things, no error. But another matter, which seems well to rule this case, is, that, being a suit *in rem*, death does not abate it.

So say some books, and I do not remember to have heard any to the contrary. It does not affect the justice of the cause; it makes no odds to the plaintiff in error, whether the money is to be paid to Colonel *Doane* being alive, or to his legal representatives, if dead.

The 4th exception, that damages are not prayed for, yet decreed, is answered by a prayer for general relief.

The 8th exception is, that the District and Circuit Court possessed not admiralty jurisdiction, and that the Circuit Court had no right to carry the decree into execution.

If courts of Admiralty can carry into execution decrees of foreign Admiralties, as seems to be settled law and usage; and if the District and Circuit Courts, have admiralty powers by the law and constitution, as was adjudged and determined by this court last *February*, I think there can be no doubt upon this point.

Another question of consequence is, whether Mr. *George Wentworth*, being agent for the captors, and having paid over, can be answerable jointly with the other libellants for the whole, or, in any way, for any part. If it was simply the case of an agent regularly paying over, I should suppose he could not justly be called upon to refund. But it seems he was an original libellant, a party through the whole course of the suit ; and an appeal being claimed in time, at the court and term, at which the libellants obtained the decree (of which, therefore, he had legal notice) the appeal, if a lawful one, in my opinion, suspended the sentence and must make him answerable for whatever monies he should receive under that decree, in case of reversal : every man being bound to take notice of the law, at his peril.

It is suggested, that an inhibition was necessary to take off the force of the sentence. An inhibition (according to the form of one produced, which issued in *England* last July, near four months after the trial and appeal at *New-Providence*) inhibits the judge and the party from doing any thing in prejudice of the appeal, or of the jurisdiction of the court appealed to, and cites the party to appear and answer the party appellant, at a certain time and place. The citation to the party to appear and answer at the proper time and place, I take to be the most substantial part of the process ; the inhibitory part to be rather matter of form, or in pursuance of the suspending nature of the appeal, and as a further guard and caution against misapplying the property. For it appears to me absurd to suppose, that an inhibition taken out seven or eight months
p. 119 after the | appeal (nine months being allowed for the purpose) should be the only thing that suspended the sentence, leaving the judge below and the party, all that time, to carry the sentence into compleat execution.

The judicial act in providing an appeal in maritime causes to the Circuit Court, contains no hint of an inhibition as necessary to suspend the sentence. *Domat* is express, that an appeal has that effect, and I believe other civil law writers.

The rejection of the appeal, if unwarranted, could not take away the right of the citizen.

There does not appear any thing actually compulsory upon Mr. *George Wentworth*, to pay the money, except what may be supposed to be contained in the decree appealed from, the force of which was suspended. All this matter might have been offered at the Court of appeals, where the parties were fully heard, and, if offered, was, no doubt, involved in their decision.

It is said, if I understood the matter right, that there ought to have been a monition from the Circuit Court to Mr. *Wentworth*, to bring in what he had in his hands.

I see no necessity for a monition exactly in that form. There was a

monition to come in and answer the libellants upon the justice of the cause, as set forth ;—he came in and had an opportunity to defend himself : and the question was, whether he was answerable upon the circumstances of the case, which was determined by the court.

By the cases in *Durnford* and *East*, as well as from other books, it is clear that the admiralty has not only jurisdiction *in rem*, but also power over the persons of the captors and all those who have come to the possession of the proceeds of the prize, to do complete justice as the case requires, to captors and claimants.

But I cannot conceive why the decree of the court of appeals is not conclusive upon Mr. *George Wentworth* as much as upon the other libellants.

Again ; it is objected, that the decree being for restoration, damages could not be awarded. The decree was not complied with—the thing was gone. How, then, could justice be done without giving damages ?

Then the question is, how are we to understand the decree ; as joint upon all the libellants for the whole, Mr. *George Wentworth* included, or as decreeing the owners to restore one half, and Mr. *George Wentworth*, agent for the captors, the other half ?

If the latter, which perhaps may be a reasonable and just construction, conformable to the spirit of the original libel, then the decree of the Circuit Court is in that respect erroneous. | Also as to p. 120
damages, I suppose, interest ought not to have been allowed farther back than the decree. The only question that remains, is whether this court can rectify those errors, consistently with the judicial act. And I think it may, as there is sufficient matter, apparent upon the record, to do it by.

I agree that each party bear their own costs of this court.

By the Court. *Ordered*, That against all the Plaintiffs in error, except *George Wentworth*, sixteen thousand three hundred and sixty dollars and sixty-eight cents, be recovered by the Defendants in error, and the same sum against *George Wentworth*; and that against the Plaintiffs in error the costs of the Circuit Court be recovered, one half against *George Wentworth*, and the other half against the other Plaintiffs in error; and that in this Court the parties pay their own costs.

The United States v. Richard Peters, District Judge.

(3 Dallas, 121) 1795.

This was a motion for a Prohibition to the District Court of *Pennsylvania*, where a Libel had been filed, by *James Yard*, and process of attachment thereupon issued, against the *Cassius*, an armed *Corvette*,

belonging to the *French Republic*, and *Samuel Davis*, her Commander. The Libel was in these words :

'To the Honorable *Richard Peters*, Esquire, Judge of the District Court of *Pennsylvania*. The Libel and Complaint of *James Yard*, of the State of *Pennsylvania*, in the *United States* of *America*,

'HUMBLY SHEWETH, That the said *James Yard* is the owner of the schooner *William Lindsey*, and her cargo : That on or about the day of last, the said schooner sailed from the island of *St. Thomas*, to the city of *St. Domingo*, in the island of *Hispaniola* ; commanded by a certain *Walter Burke*, and laden with about one hundred and forty-two barrels of Flour, six puncheons of Rum, and other Merchandize, of the value of two thousand dollars, the said vessel and cargo amounting in all to ten thousand dollars, lawful money of the *United States* of *America*, all regularly cleared out, from the said island of
p. 122 *St. Thomas*, and furnished with all Documents, | usual, necessary, and proper, and being on a voyage to the said port of *St. Domingo*, on the twentieth day of *May*, in the year of our Lord one thousand seven hundred and ninety-five, the said schooner *William Lindsey*, was forcibly, violently, tortiously, and contrary to the laws and usages of nations, attacked and taken, by a certain armed vessel called the *Cassius*, commanded by a certain *Samuel Davis*, pretending an authority from the *French Republic*, but then, and now, a citizen of the *United States* of *America* ; and being so taken, was, by the said *Samuel Davis*, forcibly, violently, tortiously, and contrary to the Laws of Nations, carried into *Port de Paix*, where the said schooner *William Lindsey*, with her cargo, tackle, apparel and furniture, still are, forcibly, tortiously, and illegally, detained : And your libellant does not admit, that the vessel, called the *Cassius*, was authorized, by the *French Republic*, to capture vessels belonging to the *United States*, who were at that time, and still are, at peace with the said *French Republic* : That the vessel called the *Cassius*, was originally equipped and fitted for war in the port of *Philadelphia*, in *Pennsylvania*, one of the *United States* of *America*, contrary to the laws of the said *United States*, and the laws and usages of nations : That your libellant has never received compensation for the damages he has suffered, and has not been able to retrieve the said vessel, with her tackle, apparel, and furniture : That the said vessel, called the *Cassius*, and the said *Samuel Davis*, are now in the port of *Philadelphia*, and within the jurisdiction of this Court : In order, therefore, that your libellant may be compensated for the damages he has incurred, by the aforesaid illegal and tortious taking, and detention, of the said schooner *William Lindsey*, with her cargo, tackle, apparel, and furniture ; and that all may be done touching the premises, which to your Honor may seem just and right : May it please your Honor to cause to be issued, Process for seizing the said

vessel, called the *Cassius*, with her tackle, apparel, and furniture; and for arresting the body of the said *Samuel Davis*, so that he be, and appear, &c.'

The suggestion, on which the motion for a prohibition was founded, set forth,

'That on the 21st day of *August*, in the year of our Lord one thousand seven hundred and ninety-five, Before the honorable *John Rutledge*, Esquire, Chief Justice, and his associate justices of the Supreme Court of the *United States*, at *Philadelphia*, comes *Samuel B. Davis*, by *Benjamin R. Morgan*, his attorney, and gives this honorable court, now here, to understand, and be informed, That whereas, by the laws of nations, and the treaties subsisting between the *United States*, and the Republic of *France*, the trial of prizes taken | on the high seas, without the territorial p. 123
limits and jurisdiction of the *United States*, and brought within the dominions and jurisdiction of the said Republic, for legal adjudication, by vessels of war belonging to the sovereignty of the said Republic, acting under the authority of the same, and of all questions incidental thereto, does of right, and exclusively belong to the tribunals and judiciary establishments of the said Republic, and to no other tribunal or tribunals, court or courts whatsoever:—And whereas, by the said laws of nations and treaties aforesaid, the vessels of war belonging to the said *French* Republic, and the officers commanding the same, cannot, and ought not to be arrested, seized, attached, or detained, in the ports of the *United States*, by process of law, at the suit or instance of individuals, to answer for any capture or captures, seizure or seizures, made on the high seas, and brought for legal adjudication into the ports of the *French* Republic, by the said vessels of war, while belonging to, and acting under the authority, and in the immediate service of the said Republic.—And whereas, by the laws and treaties aforesaid. the District Courts of the *United States*, have not and ought not to entertain jurisdiction, or hold plea of such captures, made as aforesaid, under the above circumstances. And whereas, by the laws of nations, the vessels of war of Belligerent powers, duly by them, authorized to cruize against their enemies, and to make prize of their ships and goods, may in time of war arrest and seize the vessels belonging to the subjects or citizens of neutral nations, and bring them into the ports of the sovereign under whose commission and authority they act, there to answer for any breaches of the laws of nations, concerning the navigation of neutral vessels in time of war; and the said vessels of war, their commanders, officers, and crews, are not amenable before the tribunals of neutral powers, for their conduct therein, but are only answerable to the sovereign in whose immediate service they were, and from whom they derived their authority: And whereas, on and before the twentieth day of *May*, now last past, the said *Samuel B. Davis*.

was, and now is, a lieutenant of ships in the navy of the said *French* Republic, and commander of a certain corvette or vessel of war, called the *Cassius*, then, and now, the property of the said Republic, and in her immediate service, and on the said twentieth day of *May*, was duly commissioned by, and under the authority of the said, Republic, to cruize against her enemies, and make prize of their ships and goods, (as by his commission, and the certificate of the Minister Plenipotentiary of the said Republic, to the *United States*, to the court now here, shewn, fully appears). Nevertheless, a certain *James Yard*, of the City of
p. 124 *Philadelphia*, merchant, not ignorant of the premises, but contriving | and intending to disturb the peace and harmony subsisting between the *United States* and the *French* Republic, and him the said *Samuel B. Davis*, wrongfully to aggrieve and oppress and draw to another proof, him the said *Samuel B. Davis*, and the said corvette or vessel of war of the *French* Republic, the *Cassius*, in the port of *Philadelphia*, under the protection of the laws of nations and of the faith of treaties, has, by process out of the District Court of the *United States*, in and for the District of *Pennsylvania*, attached and arrested him, the said *Samuel B. Davis*, and the said corvette or vessel of war, the *Cassius*, and before the Judge of the said District Court, contrary to the said law of nations and treaties, and against the form of the laws of the *United States*, hath unjustly drawn in plea, to answer to a certain libel, by him, the said *James Yard*, against him the said *Samuel B. Davis*, and the said corvette or vessel of war, the *Cassius*, her tackle, apparel and furniture, exhibited and promoted, craftily and subtilly there alledging, articulating and objecting, that on the said twentieth day of *May*, now last past, the said *Samuel B. Davis*, then commanding the said corvette or vessel, the *Cassius*, did forcibly, violently and tortiously take on the high seas, a certain schooner or vessel, belonging to the said *James Yard*, called the *William Lindsey*, and brought her into *Port de Paix*, (in the dominions of the *French* Republic) where she still remains, and also alledging and articulating, that the said corvette or vessel, called the *Cassius*, was originally equipped and fitted for war, in the port of *Philadelphia*, in the *United States*, and that the said *Samuel B. Davis*, was, at the time of the said capture, and now is, a citizen of the *United States*, without this, however, and the said *James Yard*, not in any manner alledging or articulating, that the said capture was made within the territory, rivers or bays of the *United States*, or within a marine league of the coast thereof, or that the said corvette or vessel, the *Cassius*, was so fitted or equipped for war, in the *United States*, by the said *French* Republic, her agent or agents, with their knowledge, or by their means or procurement, or by the said *Samuel B. Davis*, or that at the time of her being so equipped, or fitted for war in the *United States*, (if ever there, she was so, in any manner fitted or equipped) she was the property of the

said *French* Republic, or that the said *Samuel B. Davis* was, in any manner, in the said equipment or fitting for war, concerned ; and without this also, and the said *James Yard*, not in any manner alledging, that the said *Samuel B. Davis* was retained, or engaged in the service of the *French* Republic, within the territory or jurisdiction of the *United States*—And the said *James Yard*, him, the said *Samuel B. Davis*, and the said corvette or vessel of war, called the *Cassius*, by force of the process aforesaid, out | of the said District Court, had and obtained, as aforesaid, still wrongfully p. 125 detains, and the said *Samuel B. Davis*, and the *French* Republic, owner of the said corvette or vessel of war, thereupon, in the said District Court to answer, and in the premises cause to be condemned, with all his power endeavours, and daily contrives, in contempt of the government of the *United States*, against the laws of nations, the treaties subsisting between the *United States* and the *French* Republic, and against the laws and customs of the *United States*, to the manifest violation of the said laws of nations, and treaties, and to the manifest disturbance of the peace and harmony, happily subsisting between the *United States* and the said *French* Republic—and this he is ready to verify. Wherefore, the said *Samuel B. Davis*, the aid of this honorable court, most respectfully requesting, prays remedy, by a writ of prohibition, to be issued out of this honorable court, to the said Judge of the District Court of the *United States*, in and for the District of *Pennsylvania*, to be directed to prohibit him from holding the plea aforesaid, the premises aforesaid any wise concerning, farther before him.

MORGAN.

Samuel B. Davis, being duly sworn, on his oath, doth say, that all and singular, the facts, by him in this suggestion stated, are true.

S. B. DAVIS.

Sworn in open Court, *August 22d.* 1795.

I. WAGNER, D. C. Sup. Ct. U.S.'

The motion for the prohibition was supported by *Ingersoll Du Ponceau* and *Dallas*, and opposed by *Tilghman* and *Lewis* : And the controversy, turned principally, upon this point—Whether the District Court could sustain a libel for damages, in the case of a capture, *as prize*, made by a belligerent power, on the high seas, when the vessel captured was not brought within the jurisdiction of the *United States*, but carried, for adjudication *infra præsidia* of the captors ?

Dallas, in opening the argument for the prohibition, contended, 1st. That a prohibition will lie in this case ;—2d. That on the face of the libel, it was evident, that the District Court had no jurisdiction ;—3d. That on the facts disclosed in the suggestion, the District Court ought

not to be allowed to take jurisdiction ;—and 4th. That the allegations of the libel itself, would not support the proceedings below.

I. A prohibition will lie in this case. The three great objects of the judicial power are an authority—1st. to administer justice ; 2d. to compel the unwilling, or negligent, magistrate, to perform his duty ; and 3d. to
p. 126 restrain the ministers of justice | within the regular boundaries of their respective jurisdictions. The judicial power is, therefore, either abstract or relative ; in the former character, the court, for itself, declares the law and distributes justice ; in the latter, it superintends and controuls the conduct of other tribunals, by a prohibitory, or mandatory, interposition. This superintending authority has been deposited in the Supreme Court, by the Federal Constitution ; and it becomes a duty to exercise it upon every proper occasion. The writ of prohibition is said, indeed, by the *English* books, to be grantable *ex debito justiciæ*. 1 *Sir T. Raym.* 3. 4. and, it is certain, that the Constitution and laws of the Union fix no limitation to the exercise of the power of this court upon the subject, but, by way of implication, that it shall be warranted by the principles and usages of law. *Judicial Act. s.* 13. The principles and usages of law, warrant, that a prohibition shall issue—1st where the cause does not originally belong to the inferior Court ; and 2d. where the collateral matter arising from the cause is not within the jurisdiction of the inferior Court. Nor does the writ issue merely to forbid proceeding in such cases as belong to the common law courts ; for, it equally issues to forbid proceeding in cases that do not belong to the inferior Court, though the courts at common law can give no remedy. *Woods. Inst.* 570. *F. N. B.* 106. *T.* 1 *Wood.* 142. There is, however, some diversity, whether a prohibition will issue to an Admiralty Court, till sentence ; but this clearly arises on cases originally within the jurisdiction of the court ; for, in Admiralty, as well as in ecclesiastical courts, if it appears on the face of the proceedings, that there is no jurisdiction, the court will not permit an attempt to exercise one. 3 *Burr.* 1922.

II. On the face of the libel, it is evident, that the District Court has no jurisdiction. The prominent facts are, that the vessel was taken *as prize*, carried *infra præsidia* of the captor, and, at this time, actually remains there. There is no trespass stated distinct from the capture *as prize* ; and this is not a question of restitution, since the vessel is not within our jurisdiction. Besides, from the very nature of things, the question of damages must be determined by the same tribunal, that determines the question of prize : it is an incident, and whoever takes cognizance of the principal question, must likewise take cognizance of that. In the *French* Court of Admiralty, the captor and the captured, will stand on a fair and equal footing ;—the one, to shew the grounds of condemnation, or, at least, of justifiable suspicion for searching and

seizing a neutral vessel;—the other, to repel the allegation, to obtain restitution, and to recover damages. By the law of nations, the right of judging is vested in the courts of the captor; the principles | of justice p. 127
enforce the rule in the present instance; for, all the witnesses and documents are with the prize. If, then, the courts of the captor have a right to decide the question of prize, and their decision is binding on all the world, can damages be obtained here, when condemnation has been, or may be, decreed there? In the *Silesia* case, the *British* Lawyers remonstrated against the appointment of a *Prussian* court of commissioners, to re-examine and re-judge the sentences of their admiralty. *Collect. Jurid.* Let the facts be as they may, the sentence of the *French* court must be conclusive. Thus, where an Englishman's vessel was taken by a *French* privateer, *England* and *France* being at peace, and condemned as *Dutch* property, the court would not examine into the sentence. *Sir T. Raym.* 473. 1 *Dall. Rep.* 78. The very statement in the libel, establishes the presumption that the vessel captured was carried into *Port de Paix*, for legal adjudication; and if justice requires, she will not only be restored, but damages will be there awarded. Where the cause of prohibition appears on the face of the libel, it need not be pleaded below. 2 *Salk.* 551.

III. On the facts disclosed in the suggestion, the District Court ought not to be allowed to take jurisdiction. The Constitution of the *United States* might have rendered the individual states, nay, the Union itself, amenable as defendants at the suit of individuals; but it could not, in that way, bind other sovereign nations, not parties to the compact. Even, indeed, with respect to the States, the language of the proposed amendment, is, that 'the judicial power of the *United States shall not be construed* to extend to any suit, &c.' by individuals against a state; which furnishes, at least, a legislative opinion of the exemption of sovereigns from such process. But the law of nations is express on the subject. *Vatt. b. c. s. p.* and *Pennsylvania* has heretofore judicially recognized the doctrine. 1 *Dall. Rep.* The *Cassius* being then the property of a sovereign and independent nation, cannot be attached for any supposed delinquency of her commander, committed on the high seas: it would be making public property responsible for private wrongs. What would be the consequence of an acquiescence in the jurisdiction now set up? Every privateer, every national vessel of war, would be liable to seizure at the instance of every individual, who pretended he was injured. Could the *American* citizens, who have suffered by spoliation, seize the *British* frigates, or privateers, upon their entrance into our port? Could Captain *Bliss*, whose pilot boat was seized, and rifled of the public papers of the *French* Minister, within the waters of the *United States*, attack the *Africa*, or arrest *Captain Holme*, who had perpetrated | the outrage? The abuse p. 128

of a public trust is cause of complaint to the Government of the offending party; but to retaliate by seizure, without first demanding redress, is contrary to the general rights and laws of nations, as well as contrary to the existing treaty between the *United States* and *France*.

IV. The allegations of the libel itself cannot support the proceeding. 1st It is alledged, that the captured vessel was neutral property: but this is a fact to be proved in the *French* Admiralty; for, the neutral vessel might be carrying contraband articles to an enemy of the captor;—she might be sailing to a blockaded port;—she might have defective papers;—or she might act in a suspicious and ambiguous manner. In any of these cases the right of search, and carrying into port for further examination, may be exercised by a belligerent power:—they are subjects for the consideration of the court of the captor, but they give no jurisdiction here.—2nd It is alledged that the Captain of the Corvette was in fact an American Citizen: but, it is answered, that there is no proof of the allegation; and even, if proved, a Citizen of the *United States* may expatriate himself; and, afterwards, in a foreign country, enter into a foreign service. It is true, that some of our treaties abandon him to be punished as a traitor; and that the fact might be examined here, with a view to punish him personally, for any infraction of our laws; but it is not a matter that can give jurisdiction to our Courts, on the question of prize, or no prize.—3d. It is alledged that the *Cassius* was illegally outfitted in the *United States*: but it is answered, that there is no allegation, either that she was illegally outfitted by the Captain, or after she had become the property of the *French* Republic. An illegal outfit is a positive offence, highly penal;—every man will be presumed innocent of it, till the contrary is proved. In ordinary cases, where there is a sale in market overt, no man is entitled to restitution till conviction; nor can there sooner be a forfeiture of an illegally outfitted vessel. But, it is conclusive, that the libel filed in this case, is not for the forfeiture, under the act of Congress, of June 1794; but for damages, in consequence of the capture as prize, which can only be given by the court having cognizance of that question. Any other interpretation of the law would be attended with intolerable inconveniences. Every owner, freighter, master, seaman, of a vessel taken as prize, might sue the Captor in every Court of every Country. No precedent of such a proceeding exists; and the universal silence on this subject, amounts to a denial of its legality.

The adverse Counsel stopped *Dallas*, and mentioned, that they had just received, but had not had time to examine, some *French* papers from *Port de Paix*, which, they believed, would shew, that the Court of Ad-
p. 129 miralty there, had actually | taken cognizance of, and decided upon, the case; and, they said, that if such was the fact, they would voluntarily withdraw, the Libel. An adjournment till the evening took place, in order

to afford an opportunity for examining the papers referred to ; but the translations not being complete, at the meeting of the Court, and the Judges declaring their intention to break up, *sine die*, the next morning, a desultory argument ensued, in the course of which the motion for the Prohibition was opposed on three grounds—1st. That the District Court had jurisdiction—2d. That even if that point were doubtful, the Prohibition ought not to issue till after sentence—and, 3dly. That on a plea to the jurisdiction, the party injured by the sentence, might have an adequate remedy on appeal. In support of these positions, were cited, 1 *Sid.* 320. *Thos. Raym. Vent.* 173. *Carth. Hard.* 406. *Skin.* 20. *Holt.*

The Judges intimated, that they would again adjourn, in order to give a further opportunity to consider the expediency of withdrawing the Libel ; but no compromise having taken place, on the 24th of *August*, THE CHIEF JUSTICE, delivered their opinion :

BY THE COURT :—We have consulted together on this motion ; and, though a difference of sentiment exists, a majority of the Court are clearly of opinion, that the motion ought to be granted. Therefore,

Let a Prohibition issue.

The Prohibition issued, accordingly, in the following form :

UNITED STATES, *ss.*

THE PRESIDENT of the UNITED STATES to the honorable RICHARD PETERS, Esquire, Judge of the District Court of the *United States*, in and for the *Pennsylvania* district : It is shewn to the Judges of the Supreme Court of the *United States*, by *Samuel B. Davis*, That whereas by the laws of nations, and the treaties subsisting between the *United States* and the Republic of *France*, the trial of prizes taken on the high seas, without the territorial limits and jurisdiction of the *United States*, and brought within the dominions and jurisdiction of the said Republic, for legal adjudication, by vessels of war belonging to the sovereignty of the said Republic, acting under the same, and of all questions incidental thereto, does of right, and exclusively, belong to the tribunals and judiciary establishments of the said Republic, and to no other tribunal, or tribunals, court, or courts, whatsoever : And whereas by the said law of nations, and treaties aforesaid, the vessels of war belonging to the said *French* Republic, and the officers commanding the same, cannot, and ought not, to be arrested, | seized, attached, or detained, in the ports of the *United States*, by process p. 130
of law, at the suit *or instance* of individuals, to answer for any capture or captures, seizure or seizures, made on the high seas, and brought for legal adjudication into the ports of the *French* Republic, by the said vessels of war, while belonging to, and acting under the authority and in the immediate service of the said Republic : And whereas by the laws

and treaties aforesaid, the District Courts of the *United States* have not, and ought not, to entertain jurisdiction or hold plea of such captures, made as aforesaid, under the above circumstances : And whereas by the laws of nations, the vessels of war of belligerent powers, duly by them authorized, to cruize against their enemies, and to make prize of their ships and goods, may, in time of war, arrest and seize the vessels belonging to the subjects or citizens of neutral nations, and bring them into the ports of the sovereign under whose commission and authority they act, there to answer for any breaches of the laws of nations, concerning the navigation of neutral ships, in time of war ; and the said vessels of war, their commanders, officers and crews, are not amenable before the tribunals of neutral powers for their conduct therein, but are only answerable to the sovereign in whose immediate service they were, and from whom they derived their authority : And whereas, on or before the twentieth day of *May*, now last past, the said *Samuel B. Davis*, was, and now is, a Lieutenant of ships in the navy of the said *French* Republic, and commander of a *corvette*, or vessel of war, called the *Cassius*, then, and now, the property of the said Republic, and in her immediate service ; and on the said twentieth day of *May*, was duly commissioned, by and under the authority of the said Republic, to cruize against her enemies, and make prize of their ships (as by his commission and the certificate of the minister plenipotentiary of the said Republic to the *United States*, to the court shewn, more fully appears). Nevertheless a certain *James Yard*, of the city of *Philadelphia*, merchant, not ignorant of the premises, but contriving and intending to disturb the peace and harmony subsisting between the *United States* and the *French* Republic, and him, the said *Samuel B. Davis*, wrongfully to aggrieve and oppress, and draw to another proof, him, the said *Samuel B. Davis*, and the said *corvette*, or vessel of war, of the *French* Republic, the *Cassius*, in the port of *Philadelphia*, under the protection of the laws of nations, and of the faith of treaties, has, by process out of the District Court of the *United States*, in and for the District of *Pennsylvania*, attached and arrested him, the said *Samuel B. Davis*, and the said *corvette*, or vessel of war, the *Cassius*, before the Judge of the said District
p. 131 Court, contrary to the said law of nations, and treaties, and | against the due form of the laws of the *United States*, hath unjustly drawn in plea, to answer to a certain libel, by him, the said *James Yard*, against him, the said *Samuel B. Davis*, and against the said *corvette*, or vessel of war, the *Cassius*, her tackle, apparel, and furniture, exhibited and promoted, craftily and subtilly therein alledging, articulating, and objecting, that on the said twentieth day of *May*, now last past, the said *Samuel B. Davis*, then commander of the said *corvette*, or vessel, the *Cassius*, did, forcibly, violently, and tortiously, take on the high seas, a certain schooner, or vessel, belonging to the said *James Yard*, called the *William Lindsey*, and

brought her into *Port de Paix*, (in the dominion of the *French* Republic) where she still remains; and also alledging and articulating, that the said *corvette*, or vessel called the *Cassius*, was originally equipped and fitted for war, in the port of *Philadelphia*, in the *United States*, and that the said *Samuel B. Davis*, was at the time of the said capture, and now is, a citizen of the *United States*: Without this, however, and the said *James Yard*, not in any manner alledging, or articulating, that the said capture was made, within the territory, rivers, or bays, of the *United States*, or within a marine league of the coast thereof, or that the said *corvette* or vessel, the *Cassius*, was so fitted or equipped for war in the *United States*, by the said *French* Republic, her agent, or agents, with their knowledge, or by the means, or procurement, or by the said *Samuel B. Davis*, or that at the time of her being so equipped, or fitted for war, in the *United States*, (if ever there she was so in any manner fitted or equipped) she was the property of the said *French* Republic, or that the said *Samuel B. Davis* was in any manner, in the said equipment, or fitting for war, concerned; and without this, also, and the said *James Yard*, not in any manner alledging, that the said *Samuel B. Davis* was retained, or engaged, in the service of the *French* Republic, within the territory or jurisdiction of the *United States*: And that the said *James Yard*, him, the said *Samuel B. Davis*, and the said *corvette*, or vessel of war, called the *Cassius*, by force of the process aforesaid, out of the said District Court, had and obtained, as aforesaid, still wrongfully detains, and the said *Samuel B. Davis*, and the *French* Republic, owner of the said *corvette*, or vessel of war, thereupon in the said District Court to answer, and in the premises, cause to be condemned, with all his power, endeavours, and daily contrives, in contempt of the government of the *United States*, against the laws of nations, and the treaties subsisting between the *United States* and the *French* Republic, and against the laws and customs of the *United States*, to the manifest violation of the law of nations, and treaties, and to the manifest disturbance of the peace and harmony happily subsisting between the | *United States* and the *French* Republic: Wherefore the said *Samuel* p. 132
B. Davis, the aid of the said Supreme Court most respectfully requesting, hath prayed remedy by a writ of prohibition, to be issued out of the said Supreme Court, to you to be directed, do prohibit you from holding the plea aforesaid, the premises aforesaid any wise concerning, further before you:—You, therefore, are hereby prohibited, that you no further hold the plea aforesaid, the premises aforesaid in any wise touching, before you, nor any thing in the said District Court attempt, nor procure to be done, which may be in any wise to the prejudice of the said *Samuel B. Davis*, or the said *corvette*, or vessel of war, called the *Cassius*; or in contempt of the laws of the *United States*: And also, that from all proceedings thereon you do, without delay, release the said *Samuel*

B. Davis, and the said *corvette*, or vessel of war, called the *Cassius*, at your peril.

WITNESS, the honorable JOHN RUTLEDGE, Esquire, Chief Justice of the said Supreme Court, at *Philadelphia*, this 24th day of *August*, in the year of our Lord one thousand seven hundred and ninety-five, and of the independence of the *United States*, the twentieth.

I. WAGNER, D. C. Sup. Ct. U.S.[1]

Talbot, Appellant, v. Jansen, Appellee, et al.

(3 Dallas, 133) 1795.

THIS was a Writ of Error, in the nature of an Appeal, from the Circuit Court for the District of *South Carolina*; and the following circumstances appeared upon the pleadings:—A *Libel* was filed against *Edward Ballard*, Captain of an armed vessel, called *L'Ami de la Liberte*, on the Admiralty side of the District Court of South Carolina, in June, 1794, by *Joost Jansen*, late master of the Brigantine *Magdalena* (then lying at *Charleston*, within the jurisdiction of the Court) in which it was set forth, that the Brigantine and her cargo were the property of Citizens of the *United Netherlands*, a nation at peace, and in treaty with the United States of *America*; that the Brigantine sailed from *Curacoa*, on a voyage to *Amsterdam*; but, on the 16th of May, 1794, being about fifteen miles N.W. of the *Havanna*, on the west side of *Cuba*, she was taken possession of by *L'Ami de la Liberte*; that on the next day the Libellant met another armed schooner called *L'Ami de la Point a Petre*, commanded by Captain *Wm. Talbot*, on board of which the mate and four of the crew of the Brigantine *Magdalena* were placed; and that the two schooners, together with the Brigantine, sailed for *Charleston*, where the last arrived on the 25th of May, 1794. The Libellant proceeds to aver, that *Edward Ballard*, was a native of *Virginia*, a citizen and inhabitant of the United States, and a Branch Pilot of the *Chesapeake* and Port *Hampton*; that *L'Ami de la Liberte* is an *American* built vessel, owned by citizens of the United States (particularly by *John Sinclair, Solomon Wilson*, &c.) and was armed and equipped in *Chesapeake-Bay* and *Charleston*, by *Edward Ballard*, and others, contrary to the President's Proclamation, as well as the general law of

[1] The proceedings on the libel for damages in the District Court, were accordingly superseded; but an information, *Ketland, qui tam, &c.* was immediately afterwards filed in the *Circuit Court*, against the *Corvette* for the illegal out-fit in violation of the act of Congress, and the vessel being thereupon attached, an application was made to Judge *Peters*, to discharge her on giving security, but the Judge was of opinion, that he had no power as District Judge, to make such an order in a cause depending in the Circuit Court. The *French* Minister, then deeming (as I have been informed) this prosecution to be a violation of the rights and property of the Republic, delivered a remonstrance to our government; and, converting the judicial enquiry into a matter of state, abandoned the *Corvette*, and discharged the officers and crew. *See 2 vol. p. 365. Ketland qui tam versus the Cassius.*

neutrality, and the law of nations ; that *Edward Ballard* had not, and could not legally have, any commission to capture, *Dutch* vessels, or property ; that the capture was in direct violation of the 13th and 19th articles of the Treaty between | *America* and *Holland* ; and that a capture p. 134 without a commission, or with a void commission, or as pirates, could not divest the property of the original, *bona fide*, owners, in whose favour, therefore, a decree of restitution was prayed.

On the 27th of June 1794, *William Talbot*, filed *a claim* in this cause ; and, thereupon set forth, that he was admitted a Citizen of the *French* Republic, on the 28th December 1793, by the Municipality of *Point a Petre*, at Guadaloupe ; and on the 2nd of January following, received a commission from the Governor of that island, as Captain of the schooner *L'Ami de la Point a Petre*, which was owned by *Samuel Redick*, a *French* citizen, resident at *Point a Petre*, since the 31st Dec. 1793, and had been armed and equipped at that place, as a privateer, under the authority of the *French* Republic. That the claimant being on a cruise, boarded and took the Brigantine, being the property of subjects of the *United Netherlands*, with whom the Republic of *France* was at war ; and that although he found a party from *L'Ami de la Liberte*, on board the Brigantine, yet as they produced no commission, or authority, for taking possession of her, the Claimant sent her as his prize into *Charleston*, having put on board several of his crew to take charge of her, and particularly *John Remsen*, in the character of Prize Master, to whom he gave a copy of his commission. The Claimant, therefore, prayed, that the Libel should be dismissed with Costs.

On the 3d of *July* 1794, the libellant filed a *Replication*, in which he set forth, that *Wm. Talbot*, the claimant, is an *American* citizen, a native and inhabitant of *Virginia* ; that his vessel (formerly called ' the *Fairplay* ') is *American* built, was armed and equipped in *Virginia*, and is owned in part, or in whole, by *John Sinclair*, and *Solomon Wilson*, *American* citizens, and *Samuel Redick*, also an *American* citizen, though fraudulently removed to *Point a Petre*, for the purpose of privateering. That *J. Sinclair* had received large sums as his share of prizes, and Captain *Talbot* had remitted to the other owners, their respective shares. That there is a collusion between Captains *Talbot* and *Ballard*, whose vessels are owned by the same persons, and sailed in company from *Charleston*, on the 5th of May, 1794.

On the 5th *July*, 1794, *William Talbot* added a duplicate to his claim, in which he protested against the jurisdiction of the court ; insisted that even if there had been a collusion between him and Capt. *Ballard*, it was lawful as a stratagem of war ; and averred that *John Sinclair* was not the owner of the privateer, that *Samuel Redick* was sole owner, and that he never had paid any prize money to *John Sinclair*.

On the 6th of *August*, 1794, the DISTRICT COURT decided in favor of
p. 135 its jurisdiction, dismissed the claim of Captain | *Talbot*, and decreed restitution of the brigantine and her cargo to the libellant for the use of the *Dutch* owners. An appeal was instituted, but in *October* Term, 1794, THE CIRCUIT COURT affirmed the decree of the District Court; and allowed two guineas *per diem* for damages, and 7 per cent. on the proceeds of the cargo (which had been sold under an order of the court) from the 6th of *August* 1794, with 82 dollars costs. Upon this affirmance of the decree of the District Court, the present writ of error was founded. It may be proper to add, that Captain *Ballard* had been indicted in the district of *Charleston* on a charge of piracy; but was acquitted agreeably to the directions given to the jury by Mr. *Justice* WILSON, who presided at the trial.

From the material facts, which appeared upon the depositions and exhibits accompanying the record, the following circumstances were ascertained:

1st. In relation to *the citizenship of Captain Talbot and the property of the vessel* which he commanded, it appeared, that he was a native of *Virginia*, that he sailed from *America* in the close of *November* 1793, and arrived soon afterwards at *Point-a-Petre*, in the island of *Guadaloupe*; that having taken an oath of allegiance to the *French* Republic, he was there naturalized by the municipality as a French citizen, on the 28th of *December* 1793; and that on the 2d of *January*, 1794, authority was given by the Governor of *Guadaloupe* to *Samuel Redick*, to fit out the schooner, *L'Ami de la Point-a-Petre*, under Captain *Talbot's* command, *Redick* having entered into the usual security, as owner of the privateer. This schooner was built in *America*, called the '*Fairplay*,' and had been owned by *John Sinclair*, and *Solomon Wilson*, *American* citizens; but she was carried to *Point-a-Petre*, by Captain *Talbot*, and there, on the 31st *December*, 1793 by virtue of a power of attorney from *Sinclair & Wilson*, dated the 24th of *November*, 1793, he sold her for 26,400 livres, as the bill of sale set forth, to *S. Redick*, who was a native of the *United States*, but had, also, been naturalized, (after an occasional residence for some time) as a citizen of the *French* Republic, on the same 28th of *December*, 1793. The bill of sale, also, stated that certain cannon and ammunition on board the vessel were included in the sale. The schooner, commanded by Captain *Talbot*, sailed immediately after this transaction, on a cruize, and had taken several prizes previously to the capture of the *Magdalena*. There was some slight evidence, also, to sanction an allegation, that of these prizes, taken subsequent to the sale of the vessel to *Redick*, a part of the proceeds had been paid by *Talbot* to the original owners, *Sinclair & Wilson*.

p. 136 2d. In relation to *the citizenship of Captain Ballard, and the* | *property of the vessel* which he commanded, it appeared, that he was a native of

Virginia; but that in the court of *Isle of Wight* county, of *April* Term, 1794, he had renounced, upon record, his allegiance to that State, and to the *United States*, agreeably to the provisions of a law of *Virginia*;[1] though previously to the capture of the *Magdalena* he had not been naturalized in, (nor, indeed, had he visited) any other country. *L'Ami de la Liberte* had been employed, but not armed, by the *French* Admiral, *Vanstable*, then lying with a fleet in the *Chesapeake*; and on the 13th *Germinal*, 1794, (1794,) he had given *Sinclair* a general commission to command her, as an advice, or packet boat. This commission, however, was assigned by indorsement from *Sinclair* to Capt. *Ballard*, the assignment was recognized by the *French* Consul at *Charleston*, on the 11th of *Floreal* (the of) following; and a copy of it had been certified and delivered by Capt. *Ballard* to the prize master of one of his prizes. There was full proof that *L'Ami de la Liberte* had received some guns from *L'Ami de la Point-a-Petre*, when they first met, by appointment, in *Savannah* river, and that she had been supplied with ammunition, &c. within the jurisdiction of the *United States*. It did not appear, that she had gone into any other than an American port, though she had made repeated cruizes, before the capture of the *Magdalena*; and there were strong circumstances to shew, that she was still owned by *Sinclair*, though she had been employed by Admiral *Vanstable*.

3d. In relation to the *concert of the two schooners, and the capture of the Magdalena*, it appeared, that before Capt. *Ballard's* vessel was fit for sea, it had been generally reported, and believed, and there was some evidence that *Sinclair* had declared, that she was destined as a concert, to cruize with Capt. *Talbot*; that Capt. *Talbot* had received a letter from *Sinclair*, directing him to proceed to *Savannah* river, and there wait for Capt. *Ballard*, in whose vessel *Sinclair* meant to sail; that, accordingly, some days afterwards Capt. *Ballard's* vessel hove in sight off *Savannah*, when Capt. *Talbot* said, 'there is our owner, let us give him three cheers;' that both vessels went | to *Tybee Bar*, and sailed more than a mile above the p. 137
light house, where four cannon and some swivels were taken from on board of Capt. *Talbot's* vessel, and mounted on board *L'Ami de la Liberte*; that *Sinclair* left the vessels in the river, and they soon after sailed together, as concerts, upon a cruize; and that, accordingly, before the capture of the *Magdalena*, they had jointly taken several prizes, and, particularly, the *Greenock*, which was taken by them on the 15th of *May*,

[1] The words of the law are these: 'Whensoever any citizen of this Commonwealth, shall, by deed in writing, under his hand and seal, executed in the presence of, and subscribed by, three witnesses, and by them, or two of them proved in the General Court, any District Court, or the court of the County or Corporation where he resides, or by open verbal declaration made in either of the said courts, to be by them entered of record, declare that he relinquishes the character of a citizen, and shall depart out of this Commonwealth, such person shall, from the time of his departure, be considered as having exercised his right of expatriation, and shall thenceforth be deemed no citizen.' *Passed 23d Dec.* 1792.

only two days before the capture of the *Magdalena*, and the *Fortune der Zee*, which was taken the very day after her capture. It appeared, that the *Magdalena* was first taken possession of by Capt. *Ballard*, who left a part of his crew on board of her ; but Capt. *Talbot* was then in sight, and, coming up in about an hour afterwards, he, also, took possession of the brigantine, and placed a prize master and some of his men on board. The two privateers continued together for several days, making signals occasionally to each other ; and, finally, Capt. *Ballard* alone accompanied the prize into *Charleston*.

The cause was argued by *Ingersoll, Dallas* and *Du Ponceau*, for the Appellant ; and by *E. Tilghman, Lewis* and *Reed* (of *South-Carolina*) for the Appellee.

On *the facts* the controversy was—Whether the two schooners were, or were not, owned by *American* citizens ? and were, or were not, illegally outfitted in the *United States* ? The question of ownership turned upon the fairness and reality of the sale of *L'Ami de la Point a Petre*, to *Samuel Redick* ; and the truth of the allegation, that *L'Ami de la Liberte*, had been purchased and commissioned by Admiral *Vanstable* for the service of the *French* Republic : And the question of illegal outfit, being conceded as to Captain *Ballard's* vessel, depended as to Captain *Talbot's* vessel, upon the circumstances, which have been recapitulated. On *the law*, the following positions were taken in favour of the Appellant.[1] |

p. 138 I. That the courts of the *United States* have no jurisdiction of the cause, because the capture of the *Magdalena* as prize, and carrying her in for adjudication, were acts performed under the authority of the

[1] Before the principal argument commenced, the two following points occurred :

I. The counsel for the Appellee, offered to give in evidence, a certificate of the collector of the customs of the port of *Charleston*, stating, that it appeared by his official books, that the duties on the cargo of the *Magdalena*, had been paid by the Appellee. But it was objected, for the Appellant, that the Collector's certificate could not be admitted to prove the fact ; the entry itself from the record, must be exemplified. Besides, the Collector is not an officer appointed to certify a record ; and as a witness, the opposite party should have had an opportunity to cross examine him. Independent, therefore, of any question, whether new evidence can be received on an appeal in this court, the certificate is inadmissible.

The Court rejected the certificate, on the general ground ; and Wilson, *Justice*, added, that he thought, at all events, it was premature to offer the evidence in this stage of the cause. The motion was renewed after the court had affirmed the decree of the court below, but with no greater success.

II. It was objected by *Dallas*, for the Appellant, that the record was not transmitted, agreeably to the directions of the judicial act, the 19th section providing, that 'it shall be the duty of Circuit Courts, in causes in equity and of admiralty and maritime jurisdiction, to cause the facts, on which they found their sentence, or decree, fully to appear upon the record, &c.' which had not been done. It is true, that the pleadings, exhibits, and sentences are certified by the clerk, not by the judges; and there may have been oral testimony in the inferior courts. *Reed*, answered, that every thing that had appeared below, now appeared here, under the seal of the Circuit Court.

After some discussion, however, the desire of the parties to obtain a decision on the merits, prevailed, and the objection was waved. The point has been since argued and decided, in the case of *Wiscart et al. v. Dauchy*, *post*.

French Republic ; the subject of the capture is the property of an enemy of the *French* Republic ; and, upon general principles, as well as by positive compact, the captor had a right to bring the prize into an *American* port. The commission of Captain *Talbot* is granted by a regular organ of the government of *France*, and if *France* recognises him as a citizen, (though *America* may have a right in the abstract, to controvert with *France* as a matter of state, the act of expatriation) no neutral power can contradict the fact for the purpose of trying the validity of the prizes of the Republic by a test, which is strictly municipal in every country, in substance, form, and operation. 1 *Com. Dig.* 269. The courts of a neutral country may undertake to determine questions of piracy ; or questions of restitution, where (as in the case of *Glass et al. versus the Betsey, ant. p.* 9.) the property of its own citizens, or of the citizens of another neutral nation, has been wrongfully seized, and brought within its jurisdiction ; or questions arising from a violation of the neutral jurisdiction of the country, as in the case of the *Grange*, which was captured in the bay of *Delaware* ; but no neutral power can determine a question of prize, upon a capture on the high seas by a belligerent power from his enemy. 4 *Inst.* 154. 2 *R.* 3 *fol.* 2. *Bynk. Q. J. p. l.* 1. 17. 2 *Wood.* 454. *Lee.* 211. *Sir L. Jenk.* 714. Thus, there is no *jus postliminium* in a neutral port ; *Vatt. b.* 3. *c.* 14. *s.* 208. *p.* 84. and *America*, as a neutral power, cannot award restitution in this case, unless two things are established, 1st, that the Plaintiff is in amity with *America*, and 2d, that *France* is in amity with *Holland*. 4 *Inst.* 154. Besides, *France*, by the 17th article of the treaty, has a right to bring into, and carry from, an *American* port, all the prizes that she takes from her enemies. That the *Dutch* owners of the vessel were enemies of *France* is notorious ; but, still, the vessel must | be *a prize*, according to the law of p. 139
nations, excluding captures within a neutral boundary, &c. That question, however, when the capture is made on the high seas, by a belligerent power of the property of his enemy, can only be decided by the courts of the country of the captors ; and to examine the right of the *French* Republic to issue a commission within her own dominions, to a person recognized and claimed by her as a citizen, is a direct attack upon the sovereignty and independence of *France*. It is urged, however, that Capt. *Talbot's* vessel was, in fact, an *American* privateer, illegally fitted out in an *American* port ; the facts do not support either branch of the allegation ; but even in that point of view, if there was a commission from the *French* Republic, the capture cannot be deemed piracy : and since passing the act of the 5th of *June* 1794, (3 *Vol. p.* 88.) there is a provision for punishing illegal outfits ; but not for restitution of their prizes, taken under a foreign commission, by foreign subjects. Upon a capture under a commission, to a *French* citizen, indeed, whether he is a native citizen or naturalized, the thing must be the same in effect, to foreign neutral

powers. Every writer supports this opinion, where the prize is carried *infra presidia*; and the *American* ports are *infra presidia* (a place of asylum and safety) for *French* prizes, by virtue of the treaty. But even if the commission had been given to an *American* citizen, it would have been consistent with the usage of nations;—every nation, (for instance, *Russia* and *England*) employing foreign officers and seamen in their privateers and ships of war; and *America* herself, it will be remembered, employed *La Fayette*, and a train of *French* officers, previous to her alliance with *France*. *See* 13 *Geo.* 2. *c.* 3. *s.* 1. 17 *vol. Stat. at Large* 358. *Lex Mer.* 318. Citizenship *de facto*, is enough for the object contemplated; and *England* provides that she herself may navigate her privateers with three fourths foreign seamen. 13 *Geo.* 2 *c.* 3.

II. That *Samuel Redick* and Captain *Talbot* had expatriated themselves, and become *French* citizens; so that the former might lawfully own, and the latter might lawfully command, a *French* privateer, for the purpose of making prize of ships belonging to the enemies of *France*. The right of expatriation is antecedent and superior to the law of society. It is implied, likewise, in the nature and object of the social compact, which was formed to shield the weakness, and to supply the wants of individuals —to protect the acquisitions of human industry, and to promote the means of human happiness. Whenever these purposes fail, either the whole society is dissolved, or the suffering individuals are permitted to withdraw from it. There are two memorable instances of the expatriation of entire
p. 140 nations (independent of the general course of the patriarchal, or | pastoral life) the one in ancient, and the other in modern story. When the *Persians* approached *Athens*, the whole *Athenian* nation embarked in the fleet of *Themistocles*, and left *Attica*, for a time, in possession of the *Persians*. *Plut. in vit. Themist. Trav. of Anachar.* 1 *vol. p.* 268. In the year 1771, a whole nation of *Tartars*, called '*Tourgouths*,' making 50,000 families, or 300,000 souls, emigrated from the banks of the *Wolga*, in *Russia*, and, after a progress of inconceivable difficulty, settled in the dominions of the Emperor of *China*, who hospitably received them, and erected a monument on the spot, to commemorate the event. *Col. Mag. for Feb.* 1788. But the abstract right of individuals to withdraw from the society of which they are members, is recognized by an uncommon coincidence of opinion; —by every writer, ancient and modern; by the civilian, as well as by the common-law lawyer; by the philosopher, as well as the poet: It is the law of nature, and of nature's god, pointing to 'the wide world before us, where to chuse our place of rest, and Providence our guide.' 2 *Bynk.* 125. *Wickefort. b.* 1. *c.* 2, *p.* 116. *Grot. b.* 2. 5. *s.* 24. *par.* 2. 3. *Dig. de cap. et post. Law.* 12. *s.* 9. *Wick. b.* 1. *s.* 11. *p.* 244. *Puff. b.* 8. 1. *c.* 11. *s.* 3. *p.* 862. 1 *Fred. Code.* 34. 5. 2 *vol.* 10. 1 *Gill. Hist. Greece.* With this law, however, human institutions have often been at variance; and no institutions more

than the *feudal system*, which made the tyranny of arms, the basis of society; chained men to the soil on which they were born; and converted the bulk of mankind into the villeins, or slaves of a lord, or superior. From the *feudal system*, sprung the law of *allegiance*; which pursuing the nature of its origin, rests on *lands*; for, when lands were *all* held of the Crown, then the oath of allegiance became appropriate: It was the tenure of the tenant, or vassal. *Blac. Com.* 366. The oath of *fealty*, and the ancient oath of allegiance, were, almost the same; both resting on lands; both designating the person to whom service should be rendered; though the one makes an exception as to the superior lord, while the other is an obligation of fidelity against all men. 2 *Bl. Com.* 53. *Pal.* 140. *Service*, therefore, was also an inseparable concomitant of *fealty*, as well as of *allegiance*. The oath of fealty could not be violated without loss of lands; and as all lands were held mediately, or immediately, of the sovereign, a violation of the oath of allegiance, was, in fact, a voluntary submission to a state of outlawry. Hence arose the doctrine of perpetual and universal allegiance. When, however, the light of reason was shed upon the human mind, the intercourse of man became more general and more liberal; the *military* was gradually changed for the *commercial* state; and the laws were found a better protection for persons and property, than arms. But | even while the practical administration of government was thus reformed, p. 141
some portion of the ancient theory was preserved; and, among other things, the doctrine of perpetual allegiance remained, with the fictitious tenure of all lands from the Crown to support it. Yet, it is to be remembered, that whether in its *real origin*, or in its artificial state, *allegiance*, as well as fealty, rests upon *lands*, and it is due to persons. Not so, with respect to *Citizenship*, which has arisen from the dissolution of the feudal system; and is a substitute for allegiance, corresponding with the new order of things. Allegiance and citizenship, differ, indeed, in almost every characteristic. Citizenship is the effect of compact; allegiance is the offspring of power and necessity. Citizenship is a political tie; allegiance is a territorial tenure. Citizenship is the charter of equality; allegiance is a badge of inferiority. Citizenship is constitutional; allegiance is personal. Citizenship is freedom; allegiance is servitude. Citizenship is communicable; allegiance is repulsive. Citizenship may be relinquished; allegiance is perpetual. With such essential differences, the doctrine of allegiance is inapplicable to a system of citizenship; which it can neither serve to controul, nor to elucidate. And yet, even among the nations, in which the law of allegiance is the most firmly established, the most pertinaciously enforced, there are striking deviations that demonstrate the invincible power of *truth*, and the homage, which, under every modification of government, must be paid to the inherent rights of man. In *Russia*, the volunteers who supply the fleet with officers, or literary insti-

tutions with professors, are naturalized. In *Poland*, an American citizen has been made Chancellor to the Crown. In *France*, Mr. *Colbert*, who was Minister of Marine, and Mr. *Necker*, who was Minister of Finances, were adopted, not native, subjects. In *England*, two years service in the navy, *ipso facto*, endows an alien with all the rights of a native. These are tacit acknowledgments of the right of expatriation, vested in the individuals; for, though they are instances of adopting, not of discharging, subjects; yet, if *Great Britain* would (*ex gratia*) protect a *Russian* naturalized by service, in her fleet, it is obvious that she cannot do so without recognizing his right of expatriation to be superior to the Empress's right of allegiance. But it is not only in a negative way, that these deviations in support of the general right appear. The doctrine is, that allegiance cannot be due to two sovereigns; and taking an oath of allegiance to a new, is the strongest evidence of withdrawing allegiance from a previous, sovereign. Thus, *Louis* XIV. received his own *quondam* subjects, the two Fidlers, as Ambassadors. Dr. *Story*, an Englishman, was sent to *England* as the
p. 142 minister of *Spain*. And in many nations the conditions | on which an expatriation may be affected (such as paying a tax, or leaving a portion of property behind) are actually prescribed. Independent, however, of these instances, in countries bound by the law of *allegiance*, it is to be considered, what are the rights of *citizenship* on the subject; and like every other question of citizenship, it depends on the terms and spirit of our social compact. The American Confederation is a complex machine, and *sui generis*. It creates joint federal powers; but it recognizes separate state powers: It is confederate to some purposes; but consolidated to other purposes. The formation of every social compact is presumed, however, by elementary writers, to be a surrender of so much, and no more, of private rights, as are necessary to the preservation and operation of the government; but this principle is not left with us to mere implication; it is formally declared in many state constitutions in favor of the people; and in the Federal Constitution, it is declared in favor of the States, as well as of the people. With respect, then, to the right of emigration, it has been under the consideration of the people and government of the Union, from the moment of their birth, as an independent nation; insomuch, that the refusal to pass laws for the encouragement of emigration to *America*, is charged as a proof of tyranny and oppression, in the enumeration of the grievances, which produced and justified the revolution. The articles of Confederation contain not any clauses, expressly granting, or restraining, the power and right of naturalization and emigration; but they contain an express reservation of all powers in favor of the States individually, which are not, in terms, transferred to the Union. An inspection of the several state constitutions will prove, that, in some form or other, the principle has been recognized by every member

of the Confederation; and the Constitution of *Pennsylvania* explicitly provides, that no law shall be passed prohibiting emigration from the state. This is, perhaps, the only direct expression of the public sentiment on the subject; but the very silence that prevails strengthens the argument. The power of naturalizing has been vested in several of the state governments, and it now exists in the general government; but the power to restrain or regulate the right of emigration, is no where surrendered by the people; and, it must be repeated, that, what has not been given, ought not to be assumed. It may be said, however, that such a power is necessary to the government, and that it is implied in the authority to regulate the business of naturalization. In considering these positions, it must be admitted, that although an individual has a right to expatriate himself, he has not a right to seduce others from their country. Hence, those who forcibly, or seductively, take away a citizen, commit an act, which | forms a fair object of municipal police; and a conspiracy, or p. 143
combination, to leave a country, might, likewise be properly guarded against. Such laws would not be an infraction of the natural right of individuals; for, the natural rights of man are personal; he has no right to *will* for others, and he does so, in effect, whenever he moves the mind of another to his purpose, by fear, by fraud, or by persuasion. The *English* law and the law of *Pennsylvania*, therefore, punish kidnapping, and transporting, or seducing, artists, to settle abroad as crimes. 4 *Bl. Com.* 219. 160. *Penn. Laws* 2 *Vol. Dall. Edit.* But this is all the power on the subject, which a government ought to possess for its preservation. The depopulation of a country by the spontaneous co-operating will of numbers, proves nothing more than that a bad government exists, or a bad soil is inhabited. Such an event, however, is too remote a possibility, to be any where a subject of apprehension; and, with respect to *America*, it is visionary indeed! If then, the power of restraining emigration is not necessary to the existence of government, much may be urged to shew, that it is a power of too delicate a nature to be trusted by the people to the integrity of any government; since, by legislative regulations, the exercise of the right might be rendered so difficult, that the right itself would be put in everlasting abeyance. Nor is there any essential coincidence in a power to regulate naturalization, and in a power to regulate emigration; so that the grant of the former shall be deemed to include the latter. The idea of *admitting*, and the idea of *excluding*, are not analogous. As to the point of policy, if a man wishes to leave a country, he is not likely to remain in it, by force, beneficially to the state. The character of the migrating individual can have no influence on the right; his private motives of interest, or of pleasure, do not affect the community; and it is of no importance to what country he goes. The moment he has expatriated himself, the state is no longer interested, no

longer responsible for his conduct; the legature, which bound them, is severed, and can never again be united, without their mutual consent: The emigrant has become an alien. But in the act of naturalization, every community has a right totally to reject applications for admission; or to prescribe the terms; and then the character of the applicant, the motives of emigration from his old country, and the evidences of attachment to his new one, are all to be considered. Let it, however, be supposed, for a moment, that the grant of the naturalization power embraces a power of regulating emigration, the question still remains, has the power of regulating emigration been exercised by Congress? And if it has not been exercised by the department of government, to which alone even by
p. 144 implication, it is granted, what authority has the | court to interfere upon the subject? That the power has not been exercised by Congress is conceded; and if the court interferes, it will be a legislative, not a judicial, act: For, although it is contended, that the law of nations furnishes rules to supply the silence of the legislature, there is scarcely a subject, to which the jurisdiction of Congress extends, that might not, on the same doctrine, be regulated, without the interposition of that body. Thus, Congress has power to define and punish piracies, felonies committed on the high seas, and offences against the law of nations; and yet, without the exercise of that power, the law of nations would supply rules as applicable to those cases, as to the case of expatriation. But naturalization and expatriation are matters of internal police; and must depend upon the municipal law, though they may be illustrated and explained by the principles of general jurisprudence. It is true, that the judicial power extends to a variety of objects; but the Supreme Court is only a branch of that power; and depends on Congress for what portion it shall have, except in the cases of ambassadors, &c. particularly designated in the constitution. The power of declaring whether a citizen shall be entitled in any form to expatriate himself, or, if entitled, to prescribe the form, is not given to the Supreme Court; and, yet, that power will be exercised by the court, if they shall decide against the expatriation of Captain *Talbot*. Let it not, after all, be understood, that the natural, loco-motive, right of a free citizen, is independent of every social obligation. In time of war, it would be treason to migrate to an enemy's country and join his forces, under the pretext of expatriation. 1 *Dall. Rep.* 53. and, even in time of peace, it would be reprehensible (say the writers on the law of nature and nations) to desert a country labouring under great calamities. So, if a man acting under the obligations of an oath of office, withdraws to elude his responsibility, he changes his habitation, but not his citizenship. It is not, however, private relations, but public relations; private responsibility, but public responsibility; that can affect the right: for, where the reason of the law ceases, the law itself must, also, cease. There is not a private relation,

for which a man is not as liable by local, as by natural, allegiance ;—after, as well as before, his expatriation : He must take care of his family, he must pay his debts, wherever he resides ; and there is no security in restraining emigration, as to those objects, since, with respect to them, withdrawing is as effectual, as expatriating. Nor is it enough to impair the right of expatriation, that other nations are at war ; it must be the country of the emigrant. No nation has a right to interfere in the interior police of another : the rights and duties of citizenship, to be conferred, or released, are matter of interior police ; and, yet, if a foreign war could affect | the question, every time that a fresh power entered into a war, a p. 145
new restraint would be imposed upon the natural rights of the citizens of a neutral country ; which, considering the constant warfare that afflicts the world, would amount to a perpetual controul. But the true distinction appears to be this :—The citizens of the neutral country may still exercise the right of expatriation, but the belligerent power is entitled to say, ' the act of joining our enemies, *flagrante bello*, shall not be a valid act of expatriation.' By this construction, the duty a nation owes to itself, the sacred rights of the citizen, the law of nations, and the faith of treaties, will harmonize, though moving in distinct and separate courses. To pursue the subject one step further : A man cannot owe allegiance to two sovereigns. 1 *Bl. Com.* he cannot be citizen of two republics. If a man has a right to expatriate, and another nation has a right and disposition to adopt him, it is a compact between the two parties, consummated by the oath of allegiance. A man's last *will*, as to his citizenship, may be likened to his last will, as to his estate ; it supersedes every former disposition ; and when either takes effect, the party, in one case, is naturally dead, in the other, he is civilly dead ;—but in both cases, as good christians and good republicans, it must be presumed that he rises to another, if not to a better, life and country. An act of expatriation, likewise, is susceptible of various kinds of proof. The *Virginia* law has selected one, when the state permits her citizens to depart ; but it is not, perhaps, either the most authentic, or the most conclusive that the case admits. It may be done obscurely in a distant county court ; and even after the emigrant is released from *Virginia*, to what nation does he belong ? He may have entered no other country, nor incurred any obligation to any other sovereign. Not being a citizen of *Virginia*, he cannot be deemed a citizen of the *United States*. Shall he be called a citizen of the world ; a human balloon, detached and buoyant in the political atmosphere, gazed at wherever he passes, and settled wherever he touches ? But, on the other hand, the act of swearing allegiance to another sovereign, is unequivocal and conclusive ; extinguishing, at once, the claims of the deserted, and creating the right of the adopted, country. Sir *William Blackstone*, therefore, considers it as the strongest, though an

ineffectual, effort to emancipate a *British* subject from his natural allegiance; and the existing constitution of *France* declares it expressly to be a criterion of expatriation. The same principle operates, when the naturalization law of the *United States* provides, that the whole ceremony of initiation shall be performed in the *American* courts; and if it is here considered as the proof of adoption, shall it not be considered, also, as
p. 146 the test of expatriation? If *America* | makes citizens in that way, shall we not allow to other nations, the privilege of the same process? In short, to admit that *Frenchmen* may be made citizens by an oath of allegiance to *America*, is, virtually, to admit, that *Americans* may be expatriated by an oath of allegiance to *France*. After this discussion of principles, forming a necessary basis for the facts in this case, it is insisted, 1st, That *Talbot* was a naturalized citizen of the *French* Republic at the time of receiving a commission to command the privateer, and of capturing the *Magdalena*. He left this country with the design to emigrate; and the act of expatriation must be presumed to be regular, according to the laws of *France*, since it is certified by the municipality of *Point a Pitre*, by the *French* Consul, and by the Governor of *Guadaloupe*. 2d, That *Redick* was also, a naturalized citizen of the *French* Republic when he purchased the vessel, and received a commission to employ her as a privateer. 3d, That *Ballard's* expatriation and commission, however doubtful, cannot affect *Talbot* and *Redick*. But still, it is objected, that these acts of expatriation, these commissions, are all fraudulent and void. In private contracts, in subjects of municipal regulation, in matters of *meum et tuum*, the rule is clear, that fraud vitiates every thing, and the fraud may be collected from circumstances. But is fraud to be presumed in a conflict of national rights? It is said, that a nation cannot be considered in the light of pirates; 1 *Wood.* so a nation cannot commit frauds. Let the matter be turned as it may, it will rest on this ground,—had *France* any authority to naturalize, or to commission, *Talbot* and *Redick*? *America* is deeply interested, at least, in withholding a concession, that any other nation, but *France*, can decide that question. The validity of her own naturalizations, the authenticity of her own commissions, and the claims of her impressed seamen, are all involved. *France*, then, is exclusively to judge; she granted the authority, she can rescind it; she can punish any abuse of it; and to her government must be the appeal, if *America*, or any other nation, has sustained an injury by it. If, indeed, on the pretext of fraud in the persons who obtain a French commission, our courts may annul them, where will the inquisitorial censorship terminate? British patents of denization, as well as French acts of naturalization; and every commission of the officers of a public ship of war, as well as of a privateer, will be alike subject to our supreme controul. But even the allegation of fraud, is unsupported by any reasonable degree

of evidence. The first circumstance relied on, is, that the acts of naturalization, bill of sale, and commission to cruize, were in the custody of Capt. *Talbot* on board the privateer, and not held by *Redick*, at *Point a Pitre*. But, surely, every privateer must be always ready to prove her ownership and authority, | to rescue her from the imputation of piracy, p. 147
and to entitle her to sell her prizes. Again, it is said, that *Redick* had no agent in *America*. But it is sufficient to answer, that the Captain of a privateer is the natural agent for the owner; that it is idle to expect that the owner of a cruizing vessel shall have an agent in every port, at which she may touch; and that, in fact, *Redick* had several agents in *Charleston*. It is added, as circumstances for suspicion, that *Talbot* has not proved that his vessel was not fitted out in the *United States*, whereas the proof of the affirmative lay with Appellee; the articles on board *Talbot's* vessel, if not put on board at *Guadaloupe* might have been for trade; and *Redick*, a *bona fide* purchaser, ought not to be affected by an illegal outfit: 2 *Esp.* 282. 3 *Wood.* 213. *Bl. C.* 262. 1 *T. Rep.* 260. 3 *T. Rep.* 437. 2 *Wood.* 412. 431. *Hard.* 349. *Cowp.* 341. 2 *T. Rep.* 750. that proof is not made of notice of the sale to *Redick*, whereas it appears that *Sinclair* and *Wilson* were actually informed of the transaction; and that *Sinclair* and *Wilson* have not been produced as witnesses by the Appellant, whereas it was the duty of the Appellee, if he thought their testimony material, to examine them, and he had the same means to compel their attendance.

III. That the capture being made by Captain *Talbot*, notwithstanding the participation of Captain *Ballard*, the vessel is a lawful prize. If, indeed, *Talbot* and *Redick* were regularly naturalized by *France*, if the vessel was regularly sold to *Redick*, and commissioned by the *French* government, it is obvious that the validity of the capture can only be impeached, by the circumstance of Capt. *Talbot's* consorting with Capt. *Ballard*. That point may be considered in two ways: 1st, Considering Captain *Ballard* as acting under colour of a commission; 2d, Considering Captain *Ballard* as acting without any authority at all.—1st, The commission which *Ballard* held, was, at least, sufficiently colourable to justify *Talbot* the commander of a *French* privateer, in associating with him against the enemies of *France*. A general order, indeed, is a sufficient commission, where there is evidence a person intended to act under it. 2 *Vatt. s.* 224. 5. 6. But he not only held a commission, but he was employed by the *French* government itself, sailed under *French* colours, and in the character of a *French* vessel had been permitted freely to leave and enter the *American* ports. It is true, that it is eventually discovered that he has clandestinely fitted out his vessel, in violation of the laws of the *United States*; but *Talbot* had no right to question the validity of the commission, nor the legality of the outfit; and even supposing *Talbot* did assist in the outfit of *Ballard's* vessel, that, as a substantive offence,

might render him amenable to punishment in our courts, but it could not vacate his *French* commission, nor render him, as a *French* citizen, a
p. 148 pirate throughout the world. | The validity of the commission and the legality of the outfit are questioned, however, by a *Dutch* subject, before an *American* tribunal; and yet, such a plea would not be sustained in *France*, and could not be allowed even in *Holland*. With respect to *America* herself, whatever punishment she denounces, for a violation of her neutrality, she may inflict; but on principles of justice, she cannot convert one crime into another, an illegal outfit into piracy; she cannot punish for holding a commission, recognized by the authority that issued it; she cannot make an innocent man (for instance, *Redick*, the owner of the privateer) responsible for a guilty one; she cannot impair the right, or confiscate the property, of a man acting under a due authority, in order to punish a man acting without due authority; and she cannot punish a man for associating out of her jurisdiction, with another, contrary to her laws, but consistently with the laws of the country to which he belongs. But what more did *Talbot* do, than is justifiable on the principle of stratagem by the laws of war? It is illegal to outfit a vessel of war within the *United States* under colour of a *French* commission; and, yet, after the vessel is outfitted, and on the high seas, may not an officer of *France*, without vacating his commission, employ her? Foreigners are often retained as spies, and sometimes pressed into the service of a belligerent power. *Vatt. B. c. s. p.* 593, 557. *Grot. Puff. Heinec.* 170. Why may they not be employed as consorts in cruizing? A colourable commission was deemed sufficient to rescue Captain *Ballard* from a conviction for piracy; and if for that purpose, it ought surely to be sufficient to save *Talbot*, or rather, indeed, *Redick*, the party really interested, from a charge of piracy, the forfeiture of his commission, and the loss of the prize. Where there is a commission, there can be no piracy. 2 *Woodes.* 425. 2 *Sir L. Jenk.* 754. *Moll.* 64. and capture by deputation under colour of a commission is no piracy, though the ship is carried into the port of a friend.—2 *Woodes.* 426. *Moll. B.* 1. *c.* 4. *s.* 19. *p.* 65. The case in 2 *Vern.* 592, quoted for the Appellee, is the case of *Englishmen*, acting as such, though under a *Savoy* commission, against friends of *England*; whereas the present case is that of an *American*, having lawfully expatriated himself, and after becoming a *French* citizen, receiving as such a commission, and making prize, in a *French* vessel, of the property of the enemies of *France*. But even on the point of the commission, it is said in the case that the prize might enure as a droit of Admiralty, on the principle of capture from an enemy, by an uncommissioned vessel. 2 *Woodes.* 433. And there are some authorities that go the length of saying that capture by a neutral, where there is a commission, is good.
p. 149 *Lex Merc.* 227. *Com. Dig.* | 269. 2d. But let it be supposed, in the second

place, that captain *Ballard* had no authority at all, this will not destroy captain *Talbot's* right of capture. A piratical capture does not, it is agreed, alter the property ; 2 *Wood.* 428 to 431. and as *Ballard*, in that case, had no right to seize the vessel, it still remained the property of the *Dutch* owners, liable to be seized any where by the *French*, their public enemies. *Vatt. B. c. s. p. Burl.* 219, 222, 225. *Lee on Capt.* 206. 2 *Val.* 261. If, indeed, a friend's property is retaken from a pirate, the friend shall only pay salvage ; but if an enemy's property is so retaken, the right becomes entire and absolute in the re-captor. It would be war in a neutral country, say the authorities, to secure within her territory the spoils of one of the Belligerent parties ; and is it not a greater partiality, a more striking aggression, to attempt to do so on the high seas ? It can only be by an extension of her neutral jurisdiction, that the *United States* can pretend to invalidate the capture, because the property was in the possession of *Ballard*, an *American* citizen ; and surely, the unlawful act of her own citizen can give no right or authority to the *United States*, at the expence of the right and authority of a foreign nation. If, upon the whole, *Ballard* had a colorable commission, it justified *Talbot* ; if he had no commission, his misconduct on the high seas, cannot add to the safety of the property of the *Dutch*, nor enlarge the jurisdiction and power of the *United States* ; and even if *Talbot* had consorted with *Ballard*, an avowed pirate, the prize would be good as a droit of the *French* Admiralty, though perhaps neither of the captors acquired a property in it. *Lex Merc.* 246, *Moll. b.* 1, *s.* 10. The facts, then, are briefly, that the two cruizers were in company when they first saw the *Magdalena* ; that, for their mutual interest, they afterwards separated to pursue separate vessels, that both were again in sight, however, when the prize was captured, that both took possession of her, and that both were in possession on her arrival in the port of *Charleston*. The force of one joint cruizer is the force of both ; and, like joint tenants, the possession of one is the possession of both. It cannot be said, that she was first captured by *Ballard* ; for, when two ships are in sight, both are considered as captors ; both entitled to share in the prize. 2 *Wood.* 447, *Moll. b.* 1, *c.* 2, *s.* 22. 2 *Leon.* 182, *Doug.* 324, 328, and, therefore, on that footing, if *Ballard* was not entitled, either the whole prize vested in *Talbot*, or *Ballard's* share was a droit of the Admiralty of *France* ; but *America* could have no pretence to hold, or release, any part of it. 2 *Wood.* 432. 3. 441. 456. 2 *Vern.* 592.

The Counsel *for the Appellees* insisted upon the following points : 1st. That the capturing vessels were *American* property. | 2d. That even if p. 150
the vessels were *French* property, the instruments, or agents, used to effect the capture, were *American* citizens. 3d. That both vessels were of *American* outfit, and, therefore, the capture was illegal. 4th. That, at all events, *Ballard* acquired no right by the capture, and that *Talbot*,

coming in under him, could have no higher pretensions than *Ballard* himself. From this view, it will be perceived that the course of their argument led principally to an investigation of the facts; whence concluding, that the whole transaction was collusive and fraudulent, on the part of the owners and captains of the vessels, they cited authorities to shew, that fraud vitiates every act, and that although fraud cannot be presumed, it may be proved by circumstances. 3 *Cha. Ca.* *Wils.* 230. 3 *Co.* 778. 81. 1 *Burr.* 391. 396, 4 *T. Rep.* 39.

On the points of law, the Counsel for the Appellee, held the following doctrines:

1. That *Ballard* and *Talbot* were *Americans* by birth, and had done nothing which could work a lawful expatriation. It is conceded that birth gives no property in the man; but, on the principles of the *American* government, he may leave his country when he pleases, provided it is done *bona fide*, with good cause, and under the regulations prescribed by law. 1 *Vatt. B.* 1. *c.* 19. *s.* 220. 221. 223. 224. *Grot. B.* 2. *c.* 5. *s.* 24. *Puff. B.* 8. *c.* 11. *p.* 872, and provided, also, that he goes to another country, and takes up his residence there, under an open and avowed declaration of his intention. Thus, the rule is fairly laid down in 2 *Heinec. B.* 2. *c.* 10. *s.* 230. *p.* 220; requiring from the emigrant not only an act of departure, with the design to expatriate, but the act of joining himself to another state. But a man may be entitled to the right of citizenship in two countries; and proving that he is received by a new country, is not sufficient to prove that his own country has surrendered him. If, indeed, it is lawful for one individual, any number of individuals, may exercise the right of expatriation under the circumstances contended for; and, then, we might behold a political monster, all the citizens of a country at war, though the country itself is at peace. There must, therefore, from the nature of the case, be some restraint on this loco-motive right: and it is a reasonable restraint, recognized by the best writers, that it shall not be exercised either in contravention of a national compact, such as the American treaty with *Holland*, which declares that the citizens of either party shall not take commissions as privateers against the other. *Art.* 19. or to the injury of the emigrant's country. *Vatt. b.* 2. *c.* 6. *s.* 71 *to* 76. Privateering by the subjects of a neutral nation, is considered as an
p. 151 infamous practice. *Ibid. b.* 3. *c.* 15. *s.* 229. and if an act | committed by a citizen is approved and ratified by his country, they adopt the offence as their own. *Ibid. b.* 2. *c.* 6. *s.* 74. The power of regulating emigration, is an incident to the power of regulating naturalization. It is vested exclusively in Congress; and the *Virginia* Act, under which *Ballard* pretends to have renounced his allegiance, can have no effect on the political rights of the Union. With respect to *Talbot*, his pretended expatriation was in itself an offence, and, therefore, cannot be a justification: he sailed from

America in an armed vessel, illegally fitted out, with the design of becoming a privateer, against a nation in peace and treaty with the *United States*; and the sale of his vessel to *Redick*, was merely a colour to the general scheme of plunder and depredation, in which *Redick* was a partaker. If, then, *Talbot* is to be still considered as an American citizen, acting under a *French* commission, in capturing a *Dutch* prize, restitution must be awarded upon the principle of the decision in 2 *Vern.* 592. *Holland* being at peace with *America*, though she is at war with *France.*

2. That even supposing *Talbot's* expatriation, and the ownership of his vessel, to be sufficient to authorize his own privateering, the circumstances of consorting with *Ballard*, knowing the American character of *Ballard* and his vessel, were sufficient to invalidate the capture. Can it be reasonable, or just, that a *French* privateer should associate with a pirate, or avail himself of the power of *America*, to seize the property of her allies, bring that property into an American port, and, yet, that an American court of justice should be incompetent to redress the grievance? But the actual capture was made by *Ballard*, whose right of capture is abandoned. The tortious act had been compleated before *Talbot* was admitted by a fraudulent concert, into a share of the possession of the vessel; and even when admitted, he does not pretend to defeat the previous occupancy, or to controvert *Ballard's* claim of prize. *Ballard*, (possessed by assignment of a commission, which did not authorise capture, and which was not, in its nature assignable) had wrongfully seized the vessel of an American friend; and, surely, if at the time of such seizure, and before *Talbot* boarded the vessel, the *Dutch* owners had a right to demand justice from the *United States*, as against *Ballard*, that right could not be destroyed by any immediate consequence of the wrong on which it was founded; such as *Talbot's* being admitted by the aggressor to a joint possession. Besides, *Talbot* assisted in arming *Ballard's* vessel within the neutral jurisdiction of the *United States*; and this, together with the concert in capturing the *Magdalena*, amounted to a relinquishment, or forfeiture, of his commission.

3. That neither the law of nations, nor the treaty between | *America* p. 152
and *France*, prevents the interference of the judicial authority of the *United States*, in this case; and it has already been adjudged, that the District Court has Admiralty jurisdiction, both as a Prize and Instance Court. *Ant. p.* 6. It is enough to repel the argument founded on the law of nations, to state, that the question is not, whether the court will take cognizance of a capture, made on the high seas, by the citizens of *France*, of the property of the enemies of that Republic, which is a question that can only be decided by the courts of the captor: but the gist of the controversy is—whether American citizens shall be permitted, under the colour of a foreign commission, to make prize of the property of the friends

of *America*, either by their own independent act, or in collusion and concert with a real *French* privateer? As to the 17th article of the treaty with *France*, giving it a fair and rational exposition, it cannot include prizes taken by privateers unlawfully equipped in the American ports; and the vessels taken as prize, must not only belong to the enemies of *France*, but be such as are taken *bona fide* by the citizens of *France*; which was not the fact in the present instance.

On the 22d of *August*, 1795, the Judges delivered their opinions *seriatim*.

PATERSON, *Justice*.—The libel in this cause was exhibited by *Joost Jansen*, master of the *Vrouw Christiana Magdalena*, a *Dutch* brigantine, owned by citizens of the *United Netherlands*; and its prayer is, that *Edward Ballard*, and all others, having claim, may be compelled to make restitution. The District Court directed restitution; the Circuit Court affirmed the decree; and the cause is now before this court for revision. The *Magdalena* was captured by *Ballard*, or by *Ballard* and *Talbot*, and brought into *Charleston*. The general question is, whether the decree of restitution was well awarded. In discussing the question, it will be necessary to consider the capture as made,

1. By *Ballard*.

2. By *Ballard* and *Talbot*.

1. By *Ballard*. This ground not being tenable, has been almost abandoned in argument. It is, indeed, impossible to suggest any reason in favor of the capture on the part of *Ballard*. Who is he? A citizen of the *United States*: For, although he had renounced his allegiance to *Virginia*, or declared an intention of expatriation, and admitting the same to have been constitutionally done, and legally proved, yet he had not emigrated to, and become the subject or citizen of, any foreign kingdom or republic. He was domiciliated within the *United States*, from whence he had not removed and joined himself to any other country, settling
p. 153 there his fortune, and family. | From *Virginia*, he passed into *South Carolina*, where he sailed on board the armed vessel called the *Ami de la Liberte*. He sailed from, and returned to, the *United States*, without so much as touching at any foreign port, during his absence. In short, it was a temporary absence, and not an entire departure from the *United States*; an absence with intention to return, as has been verified by his conduct and the event, and not a departure with intention to leave this country, and settle in another. *Ballard* was, and still is, a citizen of the *United States*; unless, perchance, he should be a citizen of the world. The latter is a creature of the imagination, and far too refined for any republic of ancient or modern times. If however, he be a citizen of the world, the character bespeaks universal benevolence, and breathes peace on earth and good will to man; it forbids roving on the ocean in quest

of plunder, and implies amenability to every tribunal. But what is conclusive on this head is, that *Ballard* sailed from this country with an iniquitous purpose, *cum dolo et culpa*, in the capacity of a cruizer, against friendly powers. The thing itself was a crime. Now it is an obvious principle, that an act of illegality can never be construed into an act of emigration, or expatriation. At that rate, treason and emigration, or treason and expatriation, would, in certain cases, be synonimous terms. The cause of removal must be lawful; otherwise the emigrant acts contrary to his duty, and is justly charged with a crime. Can that emigration be legal and justifiable, which commits or endangers the neutrality, peace, or safety of the nation of which the emigrant is a member? As we have no statute of the *United States*, on the subject of emigration, I have taken up the doctrine respecting it, as it stands on the broad basis of the law of nations, and have argued accordingly. That law is in no wise applicable to the present case: for, *Ballard*, at the time of his taking the command of the *Ami de la Liberte*, and of his capturing the *Magdalena*, was a citizen of the *United States*; he was domiciliated within the same, and not elsewhere; and, besides, his cause of departure, supposing it to have been a total departure from and abandonment of his country, was unwarrantable, as he went from the *United States*, in the character of an illegal cruizer. The act of the legislature of *Virginia*, does not apply. *Ballard* was a citizen of *Virginia*, and also of the *United States*. If the legislature of *Virginia* pass an act specifying the causes of expatriation, and prescribing the manner in which it is to be effected by the citizens of that state, what can be its operation on the citizens of the *United States*? If the act of *Virginia* affects *Ballard's* citizenship, so far as respects that state, can it touch his citizenship so far as it regards the *United States*? Allegiance to a particular state, is one thing; | allegiance to the *United* p. 154
States is another. Will it be said, that the renunciation of allegiance to the former implies or draws after it a renunciation of allegiance to the latter? The sovereignties are different; the allegiance is different; the right too, may be different. Our situation being new, unavoidably creates new and intricate questions. We have sovereignties moving within a sovereignty. Of course there is complexity and difficulty in the system, which requires a penetrating eye fully to explore, and steady and masterly hands to keep in unison and order. A slight collision may disturb the harmony of the parts, and endanger the machinery of the whole. A statute of the *United States*, relative to expatriation is much wanted; especially as the common law of *England*, is, by the constitution of some of the states, expressly recognized and adopted. Besides, ascertaining by positive law the manner, in which expatriation may be effected, would obviate doubts, render the subject notorious and easy of apprehension, and furnish the rule of civil conduct on a very interesting point.

But there is another ground, which renders the capture on the part of *Ballard*, altogether unjustifiable. The *Ami de la Liberte* was built in *Virginia*, and is owned by citizens of that state ; she was fitted out as an armed sloop of war, in, and, as such, sailed from, the *United States*, under the command of *Ballard*, and cruised against, and captured vessels belonging to, the subjects of *European* powers, at peace with the said states. Such was her predicament, when she took the *Magdalena*. It is idle to talk of *Ballard's* commission ; if he had any, it was not a commission to cruise as a privateer, and if so, it was of no validity, because granted to an *American* citizen, by a foreign officer, within the jurisdiction of the *United States*. We are not, however, to presume, that the *French* Admiral or Consul would have issued a commission of the latter kind, because it would have been a flagrant violation of the sovereignty of the *United States* ; and of course incompatible with his official duty. Therefore, it was not, and, indeed, could not, have been a war commission. It is not necessary, at present, to determine, whether acting under colour of such a commission would be a piratical offence ? Every illegal act, or transgression, committed on the high seas, will not amount to piracy. A capture, although not piratical, may be illegal, and of such a nature as to induce the court to award restitution.

It has been urged in argument, that the *Ami de la Liberte* is the property of the *French* republic. The assertion is not warranted by the evidence ; and if it was, would not, perhaps, be of any avail, so as to prevent restitution by the competent authority. The proof is clear and satisfactory, that she was an *American* vessel, owned by citizens of the
p. 155 *United States*, and | still continues to be so. The evidence in support of her being *French* property is extremely weak and futile ; it makes no impression, it merits no attention. But if the *Ami de la Liberte* be the property of the *French* Republic, it might admit of a doubt, whether it would be available, so as to legalise her captures and prevent restoration ; because she was, after the sale (if any took place) to the republic, and before her departure from, and while she remained in, the *United States*, fitted out as an armed vessel of war ; from whence in such capacity, and commanded by *Ballard*, an *American* citizen, she set sail, and made capture of vessels belonging to citizens of the *United Netherlands*. The *United States* would, perhaps, be bound, both by the law of nations and an express stipulation in their treaty with the *Dutch*, to restore such captured vessels, when brought within their jurisdiction, especially if they had not been proceeded upon to condemnation in the Admiralty of *France*. On this, however, I give no opinion. The *United States* are neutral in the present war ; they take no part in it ; they remain common friends to all the belligerent powers, not favoring the arms of one to the detriment of the others. An exact impartiality must mark their conduct

towards the parties at war ; for, if they favour one to the injury of the other, it would be a departure from pacific principles, and indicative of an hostile disposition. It would be a fraudulent neutrality. To this rule there is no exception, but what arises from the obligation of antecedent treaties, which ought to be religiously observed. If, therefore, the capture of the *Magdalena* was effected by *Ballard* alone, it must be pronounced to be illegal, and of course the decree of restitution is just and proper. This leads us,

II. To consider the capture as having been made by *Ballard* and *Talbot*. *Talbot* commanded the privateer *L'Ami de la Point a Pitre*. The question is, as the *Magdalena* struck to and was made prize of by *Ballard*, and as *Talbot*, who knew his situation, aided in his equipment, and acted in confederacy with him, afterwards had a sort of joint possession, whether *Talbot* can detain her as prize by virtue of his *French* commission ? To support the validity of *Talbot's* claim it is contended, that *Ballard* had no commission or an inadequate one, and therefore his capture was illegal : That it was lawful for *Talbot* to take possession of the ship so captured, being a *Dutch* bottom, as the *United Netherlands* were at open war and enmity with the *French* republic, and *Talbot* was a naturalized *French* citizen, acting under a regular commission from the Governor of *Guadaloupe*. It has been already observed, that *Ballard* was a citizen of the *United States* ; that the *Ami de la Liberte*, of which he had the command, was fitted out and armed as a vessel of war in the *United States* ; that as such she sailed from the *United States*, and cruised against | nations at peace and in amity with the said states. These acts were p. 156
direct and daring violations of the principles of neutrality, and highly criminal by the law of nations. In effecting this state of things, how far was *Talbot* instrumental and active ? What was his knowledge, his agency, his participation, his conduct in the business ? It appears in evidence, that *Talbot* expected *Ballard* at *Tybee* ; that he waited for him there several days ; that he set sail without him, and in a short time returned to his former station. This indicates connivance and a previous communication of designs. At length *Ballard* appeared. On his arrival, *Talbot* put on board the *Ami de la Liberte*, in *Savannah* river, and confessedly within the jurisdiction of the *United States*, four cannon, which he had brought for the purpose. Were these guns furnished by order of the *French* Consul ? The insinuation is equally unfounded and dishonorable. They also fired a salute, and hailed *Sinclair*, a citizen of the *United States*, as an owner. An incident of this kind, at such a moment, has the effect of illumination. *Talbot* knew *Ballard's* situation, and in particular aided in fitting out the *Ami de la Liberte* by furnishing her with guns. Without this assistance she would not have been in a state for war. An essential part of the outfit, therefore, was provided by *Talbot*.

The equipment being thus completed, the two privateers went to sea. When on the ocean, they acted in concert ; they cruize together, they fought together, they captured together. *Talbot* knew that *Ballard* had no commission ; he so states it in his claim : the facts confirm the statement ; for, about an hour after *Ballard* had captured the *Magdalena*, he came up, and took a joint possession, hoping to cover the capture by his commission, and thus to legalise *Ballard's* spoliation. How silly and contemptible is cunning—how vile and debasing is fraud. In furnishing *Ballard* with guns, in aiding him to arm and outfit, in co-operating with him on the high seas, and using him as the instrument and means of capturing vessels, *Talbot* assumed a new character, and instead of pursuing his commission acted in opposition to it. If he was a *French* citizen, duly naturalized, and if, as such, he had a commission, fairly obtained, he was authorized to capture ships belonging to the enemies of the *French* Republic, but not warranted in seducing the citizens of neutral nations from their duty, and assisting them in committing depredations upon friendly powers. His commission did not authorize him to abet the predatory schemes of an illegal cruiser on the high seas ; and if he undertook to do so, he unquestionably deviated from the path of duty. *Talbot* was an original trespasser, for he was concerned in the illegal outfit of the *Ami de la Liberte.* Shall he then reap any benefit from her captures, when
p. 157 brought within | the *United States* ? Besides, it is in evidence, that *Ballard* took possession first of the *Magdalena*, and put on board of her a prize-master and some hands ; *Talbot*, in about an hour after, came up, and also put on board a prize-master, and other men. The possession in the first instance was *Ballard's* ; he was not ousted of it ; the prey was not taken from him ; indeed, it was never intended to deprive him of it. So far from it, that it was an artifice to cover the booty. *Talbot's* possession was gained by a fraudulent co-operation with *Ballard*, a citizen of the *United States*, and was a mere fetch or contrivance in order to secure the capture. *Ballard* still continued in possession. The *Magdalena* thus taken and possessed, was carried into *Charleston.* Can there be a doubt with respect to restoration ? Stating the case answers the question. It has been said that *Ballard* had a commission, and acted under it. The point has already been considered, and indeed is not worth debating ; the commission, if any, was illegal, and of course the seizures were so. But then what effect has this upon *Talbot* ? Does it make his case better or worse ? The truth is, that *Talbot* knew that *Ballard* had no commission, and he also knew the precise case and situation of the *Ami de la Liberte* ; to whom she belonged, where fitted out, and for what purpose. *Talbot* gave *Ballard* guns within the jurisdiction of the *United States*, and thus aided in making him an illegal cruizer ; he consorted and acted with him, and was a participant in the iniquity and fraud. In short, *Ballard* took

the *Magdalena*, had the possession of her, and kept it; *Talbot* was in under *Ballard* by connivance and fraud, not with a view to oust him of the prize, but to cover and secure it; not with a view to bring him into judgment as a transgressor against the law of nations, but to intercept the stroke of justice and prevent his being punished. If *Talbot* procured possession of the *Magdalena* through the medium of *Ballard*, a citizen of the *United States*, and then brought her within the jurisdiction of the said States, would it not be the duty of the competent authority to order her to be restored? The principle deducible from the law of nations, is plain;—you shall not make use of our neutral arm, to capture vessels of your enemies, but of our friends. If you do, and bring the captured vessels within our jurisdiction, restitution will be awarded. Both the powers, in the present instance, though enemies to each other, are friends of the *United States*; whose citizens ought to preserve a neutral attitude; and should not assist either party in their hostile operations. But if, as is agreed on all hands, *Ballard* first took possession of the *Magdalena*, and if he continued in possession, and brought her within the jurisdiction of the *United States*, which I take to be the case, then no question can arise with respect to the legality | of restitution. It is an act of justice, p. 158
resulting from the law of nations, to restore to the friendly power the possession of his vessel, which a citizen of the *United States* illegally obtained, and to place *Joost Jansen*, the master of the *Magdalena*, in his former state, from whence he had been removed by the improper interference, and hostile demeanor of *Ballard*. Besides, it is right to conduct all cases of this kind, in such a manner, as that the persons guilty of fraud, should not gain by it. Hence the efficacy of the legal principle, that no man shall set up his own fraud or iniquity, as a ground of action or defence. This maxim applies forcibly to the present case, which, in my apprehension, is a fraud upon the principles of neutrality, a fraud upon the law of nations, and an insult, as well as a fraud, against the *United States*, and the Republic of *France*.

I am, therefore, of opinion, that the decree of the Circuit Court ought to be affirmed. Being clear on the preceding points, it supersedes the necessity of deciding upon other great questions in the cause; such as, whether *Redick* and *Talbot* were *French* citizens; whether the bill of sale was colourable and fraudulent; whether *Redick*, if a *French* citizen, did not lend his name as a cover; and whether the property did not continue in *Sinclair* and *Wilson*, citizens of the *United States*.

IREDELL, *Justice*.—In delivering my opinion on the great points arising in this case, I shall divide the consideration of it under the following heads:

1. Whether the District Court had jurisdiction *prima facie* upon the subject matter of the libel, taking for granted that the allegations in it were true.

2. Admitting that the court had jurisdiction *prima facie,* whether *William Talbot* had stated and supported a case sufficient to entitle him to hold the property as prize, exempt from the jurisdiction and controul of the District Court.

1. The first enquiry is,

Whether the District Court had jurisdiction *prima facie* upon the subject matter of the libel, taking for granted that the allegations in it were true.

These allegations in substance are,

That the ship was taken on the high seas, by a schooner called *L'Ami de la Liberte,* commanded by *Edward Ballard,* who had no lawful commission, to take her as the property of an enemy of the *French* Republic, under whose authority the capture was alledged to be made.

That *William Talbot,* who came up after the surrender, and put some men on board, when the prize was in possession of *Ballard,* had also no lawful commission for the purpose of such a capture, being an American citizen, and his owners American citizens likewise. |

p. 159 That there was fraud and collusion between *Talbot* and *Ballard,* both vessels being in fact the property of the same owners, *Wilson* and *Sinclair,* who were American citizens.

Such, substantially, are the allegations of the libel, and admitting them to be true, nothing is more clear than that the capture was unlawful.

But it is objected that this is a question of *prize* or no *prize,* and whether the ship was lawfully a prize, or not, is for some court of the *French* Republic alone to determine, under whose authority *Ballard* and *Talbot* alledge they acted ; and it is contended, that the capture in question being of a *Dutch* ship, and not an *American,* the *United States* have no right to decide a dispute between the *Dutch* and the *French,* in regard to a capture on the high seas, claimed as lawful by one party, and denied to be such by the other, since such an interposition would be equally a violation of the law of nations, and of the 17th article of the treaty with *France.*

To this objection, the following answers appear to me to be satisfactory :

1. That it is true, both by the law of nations, and the treaty with *France,* if a *French* privateer brings an enemy's ship into our ports, which she has taken as prize on the high seas, the *United States,* as a nation, have no right to detain her, or make any enquiry into the circumstances of the capture.

But this exemption from enquiry, by our courts of justice, in this respect, only belongs to a *French privateer, lawfully commissioned,* and, therefore, if a vessel claims that exemption, but does not appear to be duly entitled to it, it is the express duty of the court, upon application,

to make enquiry, *whether she is the vessel she pretends to be,* since her title to such exemption depends *on that very fact.*

Otherwise, any vessel whatever, under a colour of that kind, might capture with impunity, and defy all enquiry, if she kept out of a *French* port, equally in violation of the law of nations, and insulting to the *French* Republic, which, from a regard to its own honour and a principle of justice, would undoubtedly disdain all piratical assistance. She might say, now, I trust, with as much truth as dignity, *Non tali auxilio, nec Defensoribus istis tempus eget.*

2. That such an enquiry being thus proper to be made, if upon the enquiry it shall appear, that the vessel pretending to be a lawful privateer, is really not such, but uses a colourable commission for the purposes of plunder, she is to be considered by the law of nations, so far at least as a transfer of property is concerned, or a title to hold it insisted upon, in the same light as having no commission at all.

3. That *prima facie* all piracies and trespasses committed | against the p. 160
general law of nations, are enquirable, and may be proceeded against, in any nation where no special exemption can be maintained, either by the general law of nations, or by some treaty which forbids or restrains it.

It is expressly held, in an authority quoted 1 *Lex Mercatoria* 252. 'That if a *Spaniard* robs a *Frenchman* on the high seas, their princes 'being both then in amity with the crown of *England*, and the ship is 'brought into a port in *England*, the *Frenchman* may proceed *criminaliter* 'against the *Spaniard*, to punish him, and *civiliter*, to have restitution 'of his vessel.' The authorities referred to are, *Selden mare claus. Lib.* 1 *chap.* 27. *Grotius de Jure Belli et Pacis, b.* 3. *c.* 9. *s.* 16. both books of very high authority.

What is called robbery on the land, is piracy if committed at sea. 3 *Inst.* 113. 1 *Com. Dig.* 269. And as every robbery on land includes a trespass, so does every piracy at sea. 1 *Com. Dig.* 268. Consequently, if there be an unlawful taking, it may be piracy or trespass according to the circumstances of the case, both being equally unlawful, though one a higher species of offence than the other, which cannot alter the intrinsic illegality of the fact common to both, but only occasion a greater or less degree of punishment proportioned to the nature of the offence. It is, therefore, no answer to say, in bar of restitution, that no piracy has been committed, and therefore no restitution is to follow, since, if a trespass has been committed, though not a piracy, restitution is equally proper as if the offence had amounted to piracy itself.

4. That by a due consideration of the law of nations, whatever opinions may have prevailed formerly to the contrary, no hostilities of any kind, except in necessary self-defence, can lawfully be practised by one individual of a nation, against an individual of any other nation at

enmity with it, but in virtue of some public authority. War can alone be entered into by national authority; it is instituted for national purposes, and directed to national objects; and each individual on both sides is engaged in it as a member of the society to which he belongs, not from motives of personal malignity and ill will. He is not to fly like a tyger upon his prey, the moment he sees an individual of his enemy before him. Such savage nations, I believe, obtained formerly. Thank God, more rational ones have succeeded, and a liberal man can frequently see great integrity and honor on both sides, though different and irreconcileable views of national interest or principles may unfortunately engage two nations in hostility. Even in the case of one enemy against another enemy, therefore, there is no colour of justification for
p. 161 any offensive hostile act, unless it be authorised | by some act of the government giving the public constitutional sanction to it.

5. That notwithstanding an apparent contrariety of opinions on this subject, it would be easy to shew, upon principle, if not by authority, that such hostility committed without public authority on the high seas, is not merely an offence against the nation of the individual committing the injury, but also against the law of nations, and, of course, cognizable in other countries: But that is not material in the present stage of the enquiry, which affects only the conduct of our own citizens in our own vessels, attacking and taking, under colour of a foreign commission, on the high seas, goods of our friends.

This is so palpable a violation of our own law (I mean the common law, of which the law of nations is a part, as it subsisted either before the act of Congress on the subject, or since that has provided a particular manner of enforcing it,) as well as of the law of nations generally; that I cannot entertain the slightest doubt, but that upon the case of the libel, *prima facie*, the District Court had jurisdiction.

2. The next enquiry is,

Whether *William Talbot* has stated and supported a case sufficient to entitle him to hold the property as prize, exempt from the jurisdiction of the District Court.

This claim is grounded as follows:

1. That at the time of his receiving the commission, and at the time of the capture, he was a real *French* citizen, and his vessel was *French* property, viz. the property of *Samuel Redick*, a *French* citizen at *Point-a-Pitre* in *Guadaloupe*.

2. That he had a lawful commission to cruize from the *French* Republic.

3. That whether *Ballard* had a lawful commission or not, he himself was lawfully entitled: 1. To part, if *Ballard* had a lawful commission, as having been in sight at the time of the capture, and therefore contributing to intimidate the enemy into a surrender upon the common

principle. 2. If *Ballard* had no lawful commission, and is to be considered as a *pirate*, his capture did not change the property ; of course, it remained *Dutch*, and he, as captain of a *French* privateer, had a right to seize and retain it.

The first point to be considered is,

Whether *Talbot* at the time of his receiving the commission, and at the time of the capture, was a *French* citizen.

This involves the great question as to the right of expatriation, upon which so much has been said in this cause. Perhaps it is not necessary it should be explicitly decided on this occasion ; but I shall freely express my sentiments on the subject. |

That a man ought not to be a slave ; that he should not be confined p. 162
against his will to a particular spot, because he happened to draw his first breath upon it ; that he should not be compelled to continue in a society to which he is accidentally attached, when he can better his situation elsewhere, much less when he must starve in one country, and may live comfortably in another ; are positions which I hold as strongly as any man, and they are such as most nations in the world appear clearly to recognize.

The only difference of opinion is, as to the proper manner of executing this right.

Some hold, that it is a natural unalienable right in each individual; that it is a right upon which no act of legislation can lawfully be exercised, inasmuch as a legislature might impose dangerous restraints upon it ; and, of course, it must be left to every man's will and pleasure, to go off, when, and in what manner, he pleases.

This opinion is deserving of more deference, because it appears to have the sanction of the Constitution of this state, if not of some other states in the Union.

I must, however, presume to differ from it, for the following reasons :

1. It is not the exercise of a natural right, in which the individual is to be considered as alone concerned. As every man is entitled to claim rights in society, which it is the duty of the society to protect ; he, in his turn, is under a solemn obligation to discharge all those duties faithfully, which he owes, as a citizen, to the society of which he is a member, and as a man to the several members of the society individually with whom he is associated. Therefore, if he has been in the exercise of any public trust, for which he has not fully accounted, he ought not to leave the society until he has accounted for it. If he owes money, he ought not to quit the country, and carry all his property with him, without leave of his creditors. Many other cases might be put, shewing the importance of the public having some hold of him, until he has fairly performed all those duties which remain unperformed, before he can honestly abandon

the society forever. But it is said, his ceasing to be a citizen, does not deprive the public, or any individual of it, of remedies in these respects: Yet the right of emigration is said to carry with it the right of removing his family, and effects. What hold have they of him afterwards?

2. Some writers on the subject of expatriation say, a man shall not expatriate in a time of war, so as to do a prejudice to his country. But if it be a natural, unalienable, right, upon the footing of mere private will, who can say this shall not be exercised in time of war, as well as in time
p. 163 of peace, since the | individual, upon that principle, is to think of himself only? I therefore, think, with one of the gentlemen for the defendant, that the principle goes to a state of war, as well as peace, and it must involve a time of the greatest public calamity, as well as the profoundest tranquillity.

3. The very statement of an exception *in time of war*, shews that the writers on the law of nations, upon the subject in general, plainly mean, not that it is a right to be always exercised without the least restraint of his own will and pleasure, but that it is a reasonable and moral right which every man ought to be allowed to exercise, with no other limitation than such as the public safety or interest requires, to which all private rights ought and must forever give way. And if in any government, principles of patriotism and public good ought to predominate over mere private inclination, surely they ought to do so in a Republic founded on the very basis of equal rights, to be perfectly enjoyed in every instance, where the public good does not require a restraint.

4. In some instances, *even in time of war*, expatriation may fairly be permitted. It ought not then to be restrained. But who is to permit it? The Legislature surely; the constant guardian of the public interest, where a new law is to be made, or an old one dispensed with. If they may take cognizance in one instance, (as for example, in time of war) because the public safety may require it, why not in any other instance, where the public safety, for some unknown cause, may equally require it? Upon the eve of a war, it may be still more important to exercise it, as we often see in case of embargoes.

5. The supposition, that the power may be abused, is of no importance, if the public good requires its exercise. This feverish jealousy, is a passion that can never be satisfied. No man denies the propriety of the Legislature having a taxative power. Suppose it should be seriously objected to, because the Legislature might tax to the amount of 19s. in the pound? They have the *power*, but does any man fear the exercise of it? A Legislature must possess every power necessary to the making of laws. When constructed as ours is, there is no danger of any material abuse. But a Legislature must be weak to the extremest verge of folly, to wish to retain any man as a citizen, whose heart and affections are fixed on

a foreign country, in preference to his own. They would naturally wish to get rid of him as soon as they could, and, therefore, perhaps, the proper precaution would be, to restrain acts of banishment, (if such could be at all permitted) rather than to limit the legislative controul over expatriation. But is there no danger of abuse on the other side? Have not all the contentions about expatriation in the courts, arisen from *a want of the exercise | of this very authority*? For, if the Legislature had prescribed p. 164
a mode, every one would know, whether it had or had not been pursued, and *all rights, private as well as public, would be equally guarded*; but upon the present doctrine, no rights are secured, but those of the *expatriator* himself.

I, therefore, have no doubt, that when the question is in regard to a citizen of any country, whose constitution has not prohibited the exercise of the legislative power in this instance, it not only is a proper instance in which it may be exercised, but it is the duty of the Legislature to make such provision, and for my part, I have always thought the *Virginia* assembly shewed a very judicious foresight in this particular.

Whether the *Virginia* act of expatriation be now in force, is a question so important, that I would not wish unnecessarily to decide it. If it be, I have no doubt that a citizen of that State, cannot expatriate himself in any other manner. It seems most probable (but I think not certain) from this record, that *Talbot* was a citizen of *Virginia*. We are, however, undoubtedly to consider him as a citizen of the *United States*. Admitting he had a right to expatriate himself, without any law prescribing the method of his doing so, we surely must have some evidence that he had done it. There is none, but that he went to the *West Indies*, and took an oath to the *French* Republic, and became a citizen there. I do not think that merely taking such an oath, and being admitted a citizen there, in itself, is evidence of a *bona fide* expatriation, or completely discharges the obligations he owes to his own country. Had there been any restrictions by our own law on his quitting this country, could any act of a foreign country, operate as a repeal of these? Certainly not. When he goes there, they know nothing of him, perhaps, but from his own representation. He becomes a citizen of the new country, at his peril. The act is complete, if he has legally quitted his own: if not, it is subordinate to the allegiance he originally owed. By allegiance, I mean, that tie by which a citizen of the *United States* is bound as a member of the society. Did any man suppose, when the rights of citizenship were so freely and honorably bestowed on the unfortunate *Marquis de la Fayette*, that *that* absolved him, as a subject or citizen of his own country? It had only this effect, that whenever he came into this country, and chose to reside here, he was *ipso facto* to be deemed a citizen, without any thing farther. The same consequence, I think, would follow in respect to rights of citizen-

ship, conferred by the *French* Republic, upon some illustrious characters, in our own, and other countries. If merely intended, as ingeniously suggested at the bar, that upon going to *France*, and performing the usual
p. 165 requisites, they should be then *French* citizens, where is the honour | of it ? —Since any man may avail himself of an indiscriminate indulgence granted by law. Some disagreeable dilemmas, may be occasioned by this double citizenship, but the principles, as I have stated them, appear to me to be warranted by law and reason, and if any difficulties arise, they shew more strongly the importance of a law, regulating the exercise of the right in question.

His going to the *West Indies*, and taking an oath of allegiance there, considering it in itself, is an equivocal act. It might be done, with a view to relinquish his own country forever. It might be done, with a view to relinquish it for a time, in order to gain some temporary benefit by it. If the former, and this was clearly proved, it possibly might have the effect contended for. If the latter, it would shew, that he voluntarily submitted to the embarrassments of two distinct allegiances. He must make them as consistent as he can. By our treaty with *Holland*, any *American* citizen, cruising upon *Dutch* subjects, as commander of a privateer, under a foreign commission, is to be deemed a pirate. If he left *America*, for the very purpose of doing this, and became a *French* citizen, that he might have a colour for doing so, then his taking a *French* commission could not absolve him from a crime which he was committing in the very act of taking it, and of which the *French* government might not be aware, as they are not bound to take notice of any other treaties but their own. If he went, intending to reside there for a time, and to act under a commission, which he believed would, for the present, justify him, tho' this might excuse him from the guilt of piracy, it would not make such a contract lawful, because, in this case, even his intention was not *to expatriate himself forever* ; and, consequently, he still remained *an American citizen*, and had no authority to take a commission at all. It surely is impossible for us to say, he meant a real expatriation, when his conduct *prima facie*, as much indicates a crime, as any thing else. If he had such an intention before he left this country, why not mention it ? If a citizen of *Virginia*, and their act of expatriation was not in force, yet, surely, it prescribed as good a method of effecting it as any other, and his not pursuing this method, (if he really meant an expatriation) can be accounted for in no other manner, but that he was conscious, the vessel he was fitting out, was for the purpose of cruising, and would have been stopt by the government, had his design of expatriation so plainly evinced it.

I therefore, must say, there is no evidence to satisfy me, that he ceased to be an *American* citizen, so as to be absolved from the duties he

owed to his own country; and, among others, that duty of not cruising against the *Dutch*, in violation of the law of nations, generally, and of the treaty with *Holland*, in particular. |

My observations, as to *Talbot*, will, in a great measure, apply to *Redick*, who appears to have been a citizen of *Virginia*. There is no evidence to satisfy me, that he ceased to be an *American* citizen, and became a *French* citizen, absolved from the duty he owed, as a citizen, to his own country. There is nothing to shew this, but a residence of no long duration, in a *French* Island, his taking an oath to the *French* Republic, and being admitted a *French* citizen, which, for the reasons I have given, I do not think sufficient. p. 166

In addition to my other observations, I may add, how is it possible, upon this principle, for the public to know in what situation they stand, as to any one of these persons? It is not impossible, (I believe instances indeed have already happened of it) that an *American* citizen may go to some of the dominions of the *French*, become a *French* citizen for a time, enjoy all the benefits of such, and afterwards return to his own country, and claim, and enjoy, all the privileges of a citizen there, without the least possibility of the public knowing, otherwise than from accident, whether he has become a citizen of another government, or not. Suppose one of them was to insist on holding an estate in land, devised to him after his new citizenship, how could it be proved he was an alien?

Whether, therefore, the property of the privateer, was in *Redick*, or in *Wilson* and *Sinclair*, I think it was equally *American* property, tho' I confess, the weight of the evidence, impresses me strongly with a belief, that the property was *Wilson* and *Sinclair's*. And, in regard to the objection, that nothing they could say or do, or *Talbot* either, could affect *Redick*, I think, as *Talbot* appears as the agent of *Redick*, of whom we know nothing but through him, his declarations are to be regarded as *Redick's* own, and any declarations of *Wilson* or *Sinclair*, in his presence, and any of the conduct of either of them, sanctioned by him, must have the same effect, as if the declarations had been made in the presence of *Redick*, and such conduct sanctioned by himself.

I consider the proof of the commission sufficient, but deny its operation, as I consider the vessel to have been an *American* vessel, owned by an *American* or *Americans*, and with an *American* Captain on board.

I now proceed to enquire into the consequences of *Ballard's* capture, and *Talbot's* co-operation with him, tho' perhaps, upon my principles, it is not absolutely necessary.

1. *Ballard's* capture, I think, is clearly insupportable. Admitting him to have been expatriated, (which, if the *Virginia* law was in force, I think he was) he did not become a *French* citizen at all. Only one of the crew was a *Frenchman*. I think, all the rest were proved to be

p. 167 *Americans*, or *English*. She | was fitted out in the *United States*. The commission, if good at all, was of a temporary and secret nature, and seems to have been confined to a special purpose, to be executed within the *United States*. She certainly had no authority to cruize, that being specified in every commission of that nature. Whoever were her owners, she does not appear to have been *French* property. On the contrary, there is the highest possibility, that *Talbot's* and *Ballard's* vessels had the same owners. So conscious was he of the illegality of his conduct, that he even preferred no claim for the captured property.

2. *Talbot* (considering himself as master of a lawful privateer) claims upon two grounds: 1. Upon supposition of *Ballard's* being a lawful commission, he claims, as being in sight at the time of the capture. To this, it is sufficient to say, that it was not a lawful commission. 2. If *Ballard* had no lawful commission, he claims upon his independent right, alledging, that if *Ballard* had no lawful commission, the property was not changed to *Ballard*, and therefore he had a right to take.

This claim (if *Talbot's* was a lawful privateer) would undoubtedly be good, if he was not a confederate with *Ballard*. But it is clear that he was, that he cruized before and after, in company with him, that he put guns on board of his vessel; and there is the strongest reason to believe, that they both belonged to the same owners. It is true, if *Talbot* had come up, ignorant of *Ballard's* authority, and inadvertently put men on board the prize in conjunction with *Ballard*, supposing he had a lawful commission, when in reality he had not, it might with some reason be contended, that *Talbot* should hold the prize. But, wilful ignorance, is never excuseable; when there is time to enquire, enquiry ought to be made. There is not, however, the least reason for supposing any ignorance in the case. He abetted *Ballard's* authority, such as it was. He acted in support of it, not in opposition to it. It does not appear that he ever questioned it, until after his arrival in *Charleston*. It was, therefore, a mere after-thought. A man having a commission, is *authorized*, but not *compelled*, to exercise it. His will must concur to make a capture under it. It does not appear, that he relied, at sea, upon his own force, but upon *Ballard's*; at least, in this instance, upon his own and *Ballard's* in conjunction. A man having a lawful commission, is authorised to cruize himself, and to cruize in company with others, having lawful authority. It does not authorise him to associate with pirates, or any unlawful depredators, on the high seas. If he does so, he departs from his commission, assumes a new character, which that does not authorise, and risques all the consequences of it. It is impossible that *Ballard* can be guilty of |
p. 168 a crime, and *Talbot*, who associated with him, in the wilful commission of it, can be wholly innocent of it. A man can be guilty of no crime, in obeying a lawful commission. He, therefore, in this instance, if guilty

of a crime, must be considered altogether detached from a rightful authority, which he abandoned, in search of the profit of an illegal adventure. If, at sea, he acted in support of *Ballard's* claim, how can he claim now, on the principle of that being insupportable? At sea, was the place for him to make his option. He has no right, after the prize is brought into port, to say—'I made a bad option there: I supported *Ballard's* claim, 'whereas I ought to have opposed it, and stood upon my own. *I will* '*now take this Dutch ship as a prize, by my own authority.*' For such, in effect, I take to be the substance of any claim, suggested after his arrival in port.

I therefore think, upon this ground, even admitting that *Talbot's* was a rightful privateer, his claim is insupportable.

WILSON, *Justice.*—As I decided this cause in the Circuit Court, it gives me pleasure to be relieved from the necessity of giving any opinion on the appeal, by the unanimity of sentiment that prevails among the judges.

CUSHING, *Justice.*—The facts in this case, so far as they appear to me to be essential for forming an opinion, may be reduced to a very narrow compass. *Ballard*, the commander of a vessel, which was illegally fitted out in the *United States*, cruizes in company with *Talbot*, who alledges that he is a *French* citizen, and produces a *French* commission. *Ballard* captures the *Magdalena*, a *Dutch* prize; then *Talbot* joins him; and both, having put prize-masters on board, bring the prize into the harbour of *Charleston*. The questions arising on this statement are, simply, whether the capture, under such circumstances, is a violation of our treaty with *Holland*? And whether it is such a case of prize, as the courts of the *United States* can take cognizance of, consistently with the treaty between *America* and *France*? Now, the whole transaction at *Guadaloupe*, as well as here, presents itself to my mind as fraudulent and collusive. But even supposing that *Talbot* was, *bona fide*, a *French* citizen, the other circumstances of the case are sufficient to render the capture void. It was, in truth, a capture by *Ballard*, who had no authority, or colour of authority, for his conduct. He was an *American* citizen; he had never left the *United States*; his vessel was owned by *American* citizens; and the commission, which he held by assignment, was granted by a *French* admiral, within the *United States*, to another person, for a particular purpose, but not for the purpose of capture. Then, shall not the property, which he has thus taken from a nation at peace with the *United States*, and | brought within our jurisdiction, be restored to its owners? Every p. 169
principle of justice, law and policy, unite in decreeing the affirmative; and there is no positive compact with any power to prevent it.

On the important right of expatriation, I do not think it necessary to give an opinion; but the doctrine mentioned by *Heineccius*, seems to

furnish a reasonable and satisfactory rule. The act of expatriation should be *bona fide*, and manifested, at least, by the emigrant's actual removal, with his family and effects, into another country. This, however, forms no part of the ground, on which I think the decree of the Circuit Court ought to be affirmed.

RUTLEDGE, *Chief Justice.*—The merits of the cause are so obvious, that I do not conceive there is much difficulty in pronouncing a fair and prompt decision, for affirming the decree of the Circuit Court.

The doctrine of expatriation is certainly of great magnitude; but it is not necessary to give an opinion upon it, in the present cause, there being no proof, that Captain *Talbot's* admission as a citizen of the *French* Republic, was with a view to relinquish his native country; and a man may, at the same time, enjoy the rights of citizenship under two governments.

It appears, upon the whole, that *Ballard's* vessel was illegally fitted out in the *United States*; and the weight of evidence satisfies my mind, that *Talbot's* vessel, which was originally *American* property, continued so at the time of the capture, notwithstanding all the fraudulent attempts to give it a different complexion. The capture, therefore, was a violation of the law of nations, and of the treaty with *Holland.* The court has a clear jurisdiction of the cause, upon the express authority of *Pelaches's* Case. 4. *Inst.* And every motive of good faith and justice must induce us to concur with the Circuit Court, in awarding restitution.

The Decree of the Circuit Court affirmed.

The Counsel for the Appellees, then moved the court to assess additional damages, which was opposed by *Dallas*, for the Appellant; and, after argument, the following order was made:

BY THE COURT: *Ordered*, that the decree of the Circuit Court of *South Carolina* district, pronounced on the 5th day of *November*, in the year of our Lord one thousand seven hundred and ninety-four, affirming the decree of the District Court of the same district, pronounced on the sixth day of *August*, in the year of our Lord one thousand seven hundred and ninety-four, be in all its parts established and affirmed. And it is further considered, ordered, adjudged and decreed, that the said *William Talbot*,
p. 170 the Plaintiff in error, do pay to the said *Joost* | *Jansen*, the Defendant in error, in addition to the sum of one thousand seven hundred and fifty-five dollars fifty-three cents, for demurrage and interest, and eighty-two dollars for costs, in the decree of the said Circuit Court mentioned, demurrage for the detention and delay, of the said brigantine *Vrouw Christina Magdalena*, at the rate of nine dollars and thirty-three cents, lawful money of the *United States*, *per diem*, to be accounted from the fifth day of *November* last past, till the sixth day of *June* last, the day of the actual sale of the said brigantine, under the interlocutory order of

this court, of the third day of *March* last past, to wit, for two hundred and thirteen days, a sum of nineteen hundred and eighty-seven dollars and twenty-nine cents ; and also interest at the rate of seven per centum per annum, for two hundred and ninety days, on the sum of fifty-one thousand eight hundred and forty-five dollars, being the amount of the sales of the cargo of the said brigantine heretofore sold, by order and permission of the said District Court, and making a sum of two thousand eight hundred and eighty-three dollars and forty-two cents ; and also a like sum of seven per centum per annum on the amount of sales of the said brigantine *Vrouw Christina Magdalena*, under the order of this court, that is to say, interest for seventy-seven days, on the sum of eighteen hundred and twenty dollars, from the said sixth day of *June* last, making the sum of twenty-six dollars and eighty-seven cents, the whole of which interest to be accounted to this day, and making together the sum of two thousand nine hundred and ten dollars twenty-nine cents, lawful money of the *United States* ; and which said interest and demurrage, make together the sum of four thousand eight hundred and ninety-seven dollars fifty-eight cents, in addition to and exclusive of the demurrage interest and costs adjudged in the said Circuit Court of the *United States*, for *South Carolina* district ; also ninety-one dollars and ninety-three cents, for his costs and charges : and that the said *Joost Jansen* have execution of this judgment and decree by special mandate to the said Circuit Court, and process agreeable to the act of the Congress of the *United States*, in that case made and provided.

M'Donough v. Dannery, and the ship Mary Ford.

(3 Dallas, 188) 1796.

This was a writ of error to remove the proceedings and decree from the Circuit Court, for the District of *Massachusetts* ; and, the record being returned, exhibited the following facts :—On the 4th of *November*, 1794, the owners and crew of the ship *George*, filed a libel in the District Court of *Massachusetts*, in which they set forth,

That the said ship *George* was an *American* vessel, owned and navigated by *American* citizens, loaded with a very valuable cargo, principally on freight, and bound from *Virginia* for *Rotterdam* ; and that on the second day of *October* last, on the high seas, in latitude 44° and longitude 40°, they fell in with the ship *Mary Ford*, which they found utterly deserted, and abandoned, without any person on board, and in a most perilous state : That the captain and crew of the said ship *George*, took possession of the *Mary Ford*, and with the intention of saving the said ship and her cargo, the Mate, and three of the said crew, entered on board the *Mary Ford*, and at great peril of their lives, and suffering great

hardship, with the assistance of two men from a fishing vessel, whom they hired, brought her into the port of *Boston*; whereupon they pray that the said ship and cargo, may be adjudged to them.

On the 5th of *November*, 1794, *Thomas M'Donnough*, Esq. Consul of his *Britannic* Majesty, for the states of *Massachusetts*, *Rhode Island*, *Connecticut* and *New Hampshire*, filed a claim in the District Court of *Massachusetts*, and suggested, that the ship *Mary Ford*, and her cargo, at the time she was taken possession of by the crew of the ship *George*, was, and now is, owned by certain merchants, subjects of his said *Britannic* Majesty, and prayed that the same might be delivered to him, in behalf
p. 189 of said owners, on the payment of a reasonable salvage, | or, if sold, that the proceeds thereof might be delivered to him, in behalf of said owners, deducting therefrom such salvage, with costs and charges.

On the 2d of *December*, 1794, *J. B. Thomas Dannery*, Citizen and Consul of the *French* Republic, resident at *Boston*, in behalf of said *Republic*, and the citizens thereof immediately concerned, likewise filed a claim for the said ship *Mary Ford*, and her cargo; and suggested, that the said ship and her cargo, on the twenty-eighth day of *September* last, were the property of some of the subjects of the King of *Great Britain*; and afterwards, on the same day, between two and three o'clock, in the afternoon, on the high seas, were attacked, subdued, and taken by a squadron of ships, to wit, the *Filaburtier*, *Charant*, *Postilion*, *Semiellante*, *Jean Bart*, and *Ranger*, all in the public service of and belonging to the *French* Republic, commanded by Commodore *Vil Maudarine*; and that the *French* Republic, and all the citizens thereof, were then, and still are, at open war with the King of *Great Britain*, and all his subjects; and that some of the seamen of said squadron, entered on board the said ship *Mary Ford*, took compleat and entire possession of her, and took and brought away the *British* captain and seamen of said ship, and still hold them prisoners of war; and that they took and brought away the papers belonging to her;—by all which, and the laws of nations, the said ship *Mary Ford*, and her cargo, became the property of the *French* Republic and the captors, by the rights of war.

The said last mentioned claimant further suggested, that afterwards, on the twenty-ninth day of the same *September*, about three o'clock in the afternoon, the said ship and her cargo, by order of the Commodore of said squadron, from an apprehension of weakening his force, were left at sea from necessity. The said Consul prays a restoration of the said ship and cargo, to be adjudged to him, to the use of the *French* Republic, on his paying reasonable salvage, with costs and charges, or that the said ship and cargo may be decreed to be sold to the use of the *French* Republic, and her citizens concerned, after paying such salvage, costs and charges.

The facts which appear in evidence in this case are, that the *Mary*

Ford and her cargo were, before the twenty eighth day of *September*, the property of certain *British* subjects; that she was bound on a voyage from the *West Indies* to *London*;—that, on that day she was attacked on the high seas by the squadron mentioned in the claim of the Consul of the *French Republic*, or one of the ships belonging to the same, to which she struck;—that an Officer and some of the crew of one or more of the ships of said squadron entered on board, took out her Captain and all her crew, and the greatest part of the ship's papers, and that she | sailed some time, p. 190 probably more than twenty four hours, with said *French* crew on board her, in company with said squadron, and was then left by order of the Commander of said squadron, who directed her to be burnt; that some attempts were made unsuccessfully to effect this purpose;—that several *British* vessels had been captured and manned by said squadron, and many of the people of the squadron were sick, and incapable from that cause to do duty;—that from an apprehension of weakening his force, the said Commander had given the said orders; that the said ship *George* met with the said *Mary Ford* at the time and place mentioned in the Libel, and brought her and her cargo into the harbour of *Boston* under the circumstances set forth in the Libel;—The ship *Mary Ford* and her cargo have been sold by order of the Court, and with the consent of all parties.

After argument, LOWEL, Judge of the District, delivered the opinion of the court, first recapitulating the facts above stated.

'BY THE COURT. The Libellants have prayed, that the whole of the ship and cargo should be decreed to their use. There have been times in the history of nations, in which vessel and goods, left by necessity on the high seas, have been decreed the property of the finders; and where wrecks on the shore have been with-held from the original proprietors, by the sovereigns of the country, or some great man, on whose lands they have happened to be cast: But in very early times, they have, in both cases, been considered as the property of the original owner. Several of the *Roman* Emperors made their edicts and decrees, for the preservation of such property, and the restoration of it; and for a long time, the law of nations has been settled on principles consonant to justice and humanity, in favour of the unfortunate proprietors; and the persons who have found and saved the property have been compensated by such part thereof, or such pecuniary satisfaction, as the laws of particular States have specially provided, or, in want of such provision, (as the writers on the law of nations agree) by such reward as in the opinion of those who, by the municipal laws of the country, are to judge, is equitable and right. In our country, no special rule being established, this court is to determine what, in such case, is equitable and right. The rule in estimation, which ought, in my opinion, to be adopted, would be to give, if possible to ascertain it, such compensation or reward as would be sufficient inducement to engage

reasonable persons, to encounter the peril and expence of the undertaking; what this may be, must, in almost every case, depend on the estimation which the Judge, who is to decide, may make of the expence, the labour,
p. 191 the peril, and the | actual suffering of those, by whose exertions the property is saved. And, as several of the most important of these are really mental, to which no measure of weight or capacity can be actually applied, it is probable, different persons would vary considerably in their estimation of them. It may, therefore, be a thing to be wished, that every nation would make, at least, some general rules for determining such cases: but as there are none established in this country, I am bound to exercise my own judgment, in determining what is a just and equitable compensation.

'Admiralty courts having the thing saved under their controul, may either adjudge a portion of such thing to the persons who have saved it, or a sum of money to be paid by the proprietor, or from the produce of the thing sold. And in either case, the same principle ought to operate, and such parts of the thing saved, or sum of money, be decreed to those who save it, as may fully compensate them, and will encourage others to like efforts. In this case, the *Mary Ford*, when found, was at the mercy of the seas, her sails and rigging partly taken away or lost; very little or no provisions on board her; the *George* was bound on a foreign voyage, with a valuable cargo, and it does not appear that she had any supernumerary hands; those who undertook to carry her into port, found her greatly disabled and difficult to manage; the risque of their lives must have been considerable, and their exertions great. I think few cases will happen, when the compensation ought to be higher.

'Under all circumstances, therefore, I am of opinion, that *one third part of the gross proceeds of the value*, ought to be paid *to the owners and crew of the ship George*, for salvage of the said ship *Mary Ford* and her cargo, and in full compensation of their services, peril and expenses, in the following proportions which have been since settled by three merchants, named by them, and appointed by the court, viz.—*to the owners of the George, nine thousand five hundred and eighty dollars, and twenty-eight cents*, being two third parts of the sum decreed for the owners of the *George* and her crew, after *deducting three hundred and seventy dollars and forty-two cents, for the owners, for expenses* incurred and paid by them, on the joint account of the owners and the crew—and the remaining one third, viz. four thousand seven hundred and ninety dollars and fourteen cents, to the captain and crew of the *George*, in the following proportions, viz. to the Captain, eleven hundred and fifty-six dollars and twenty cents —*Lemuel Foster*, eight hundred and twenty-five dollars and ninety cents— *John Classin*, four hundred and ninety-five dollars and fifty-four cents —five seamen, three hundred and thirty dollars and thirty-six cents each— one other, two hundred and eighty-nine dollars and seven cents—the

cook, two hundred and forty-seven dollars and seventy-seven | cents—and p. 192
the boy, one hundred and twenty-three dollars and eighty-six cents.

'The next question is, to whom shall the residue be decreed? To settle this question, passages have been read from many books written on the law of nations, and others in which the municipal regulations, and decisions of several nations have been reported or commented on; and which have been supposed to be applicable to this case. The gentlemen who have been of counsel for the parties, have ingeniously supported their respective claims; I have, I trust, carefully perused their authorities and attended to their arguments;—very few of their authorities appear to me to apply; their arguments have been pertinent. I lay out of the case, the whole doctrine of *postliminy*, as applied to re-captures, which I consider as depending on the municipal regulations of States, which every sovereign has a right to make, as far, at least, as their own citizens *only*, are concerned, in such manner as may appear to them best. Under this head, though blended by some writers with the law of nations, are to be placed the regulations made, variously however, by the *European* nations, and the late Congress of the *United States*, by which the property is divested from the former owners, by capture, after twenty four hours possession by the enemy; and all other arbitrary rules, made to settle questions of like nature; also, all questions about total and partial losses on policies of insurance.

'I embrace as sound doctrine, the principle, that neutral nations ought not to decide respecting the lawfulness or unlawfulness of capture, if it appears that the captor, and the nation from whom the property is taken, are at war with each other, and the captors or their vendees, are in possession of the property, save where the territorial rights of the neutral, or the rights of their citizens, are involved in the question; *and that neutrals are always to take the existing state of things as right*; so that if either of the powers at war, or those to whom they have transferred it, *are in possession of a thing taken from their enemy in war, neutral powers are to suppose them lawfully possessed*, and ought not to enquire how long, or under what circumstances, they have possessed them. To interfere and decide in such cases, must necessarily imply *a partiality contrary to the idea of neutrality*; for, *they must either give greater firmness to the capture by deciding it to be lawful, or weaken and render it less secure, by determining it to be unlawful.* Neither are neutral powers to give aid to either party, by conducting their prizes for them, when *they* are too weak to protect and conduct them.

'These principles, I think, will serve as a guide to a decision in this case.— Neither of the belligerent powers was in possession | of this p. 193
property when found;—the *British* claimants say, it has been their's;—this is admitted by the *French* claimants;—and we have evidence of

this fact by the construction of the ship which is in our sight, by the cargo on board, and divers ships papers which were found with her. The *French* claimants say, we took her in open war,—we firmly possessed her,—and she ought to be restored to us. The reply in behalf of the *British* claimants is, you did not complete your capture; you did *not firmly possess her*; —you were too weak, consistent with other views you held more important, to retain her. Is it necessary that we should decide these questions between them? Shall we try the legality of the capture, and *decide the firmness of the possession*? Will it not be to aid, to make the capture and possession firm and legal, which is said to be incomplete? The *French* claimants say, we were under apprehension of weakening our force and so left her from necessity. The vessel has been *British*,—of this, there is no question: did she by capture and firm possession, according to the law of nations, become *French*? Of this there is at least a doubt. On considering the whole matter, *I do adjudge, order, and decree, that one third part* of the money, arising from the sales of the ship *Mary Ford* and her cargo, be paid to the persons who saved them, in the proportions before mentioned. And that the duties and all other costs and charges be first deducted from the other two third parts, and the residue *remain* in Court for the use of the *British* owners of said ship and cargo, or such other persons, who may derive right thereto from them, when the same shall be ascertained in Court.'

From the decree of the District Judge, so far only as it respects the *British* owners, the *French* Consul appealed, and the appeal being argued before the Circuit Court, the following decree was there pronounced, (Judge LOWELL declining however to give any opinion:)

'CUSHING, *Justice*. The court having fully heard the parties on the appeal in this case, by their counsel, it appears that the said ship *Mary Ford* and her cargo, being the property of some *British* subjects, were, on or about the 28th day of *September, A.D.* 1794, captured on the high seas, by a *French* squadron of ships, under the command of Commodore *Vil Maudarine*, and were taken into actual and quiet possession of said fleet, and so held for above twenty-four hours, and were then left on the high seas, without any hands aboard, after some unsuccessful attempts, by his order, to burn her, which was in consequence of many of the people of his squadron being sick, and incapable of doing duty, and from an apprehension of weakening his force in parting with any of his people, to keep on board and to conduct the said ship *Mary Ford*. |

p. 194 'That the said ship *George*, met with the said ship *Mary Ford*, and brought her and her cargo into the harbour of *Boston*, as set forth in the libel; not with intent to aid either party, in the war subsisting between the *French* Republic and the *British* nation, but to save the property from absolute loss, or in expectation of proper compensation for the trouble.

On which case the operation of the law of nations appears to the court to be, that by the said capture, the property became immediately the captor's. The questions about firm possession, appearing to relate chiefly, if not only, to cases of postliminy or recapture, or to that of a neutral vendee; things which 'tis apprehended have no place in this cause; and about which the municipal laws and regulations of different countries are very different.

'The property, then, in this case, becoming the captor's immediately by conquest, and the right of war, must so continue, until divested by recapture, or by some legal means or act to that effect. And it is not conceived, that the abandoning the ship from the occasion stated in the evidence, could amount to a recapture, so far as to invest the property in the original owners, or prevent the captors from reclaiming the possession, when opportunity offered at any time previous to a recapture. It is, therefore, considered and decreed BY THE COURT, That the decree made in the District Court, as far only as it decrees, that the said residue of the said two third parts of the money arising from the sales of the said ship *Mary Ford* and her cargo, remain in court for the use of the *British* owners of the same ship and cargo, or such other persons who may derive right thereto from them, when the same should be ascertained in court, be, and hereby is, reversed. And it is now further adjudged and decreed BY THIS COURT, That the same residue of the said two-third parts of said money, remain in court for the use of the *French* Republic, and those concerned in said capture.'

From this decree of the Circuit Court, the *British* Consul appealed; but the appeal being disallowed, the proceedings were removed into the Supreme Court by writ of error; and the Plaintiff assigned for error the decree in favor of the *French* claimants, and also the disallowance of his appeal: the defendant pleaded *in nullo est erratum*, and thereupon issue was joined.

The cause was argued on the 4th and 5th of *February*, 1796, by *E. Tilghman*, for the Plaintiff in error, and by *Ingersoll & Duponceau*, for the Defendant in error.

For the Plaintiff in error, two points were made; 1st. That the courts of the *United States* had no jurisdiction in this case: and 2d. That the property of the *British* owners of | the *Mary Ford*, was not so divested as p. 195
to give a *perfect right* to the captors.

1*st. Point.* The court cannot determine on the validity of the capture between the belligerent powers. In cases where there have been illegal outfits within the jurisdiction of the *United States*; or where their territorial neutrality and sovereignty have been invaded; or where their municipal laws have been violated; the judicial power of the Union will interpose. But the present, is barely a question of prize; unconnected

with any incidental or collateral circumstances, which justify a neutral nation in taking cognizance of the cause. *Lee on Capt.* 77.

2d. Point. The property in a prize, is not so divested by capture, as to give the captor a *full right*, until the vessel is brought into a place of safety. The *Mary Ford* was not in a place of safety; there was ground to entertain a reasonable hope of recapture; and there must be a condemnation, in a court of competent jurisdiction, before the property is conclusively transferred from the original owner to the captor. Till that is done, any length of possession will not, of itself, furnish a title to the prize. *Grot.* 582. *B.* 3. *c.* 6. *s.* 3. *Puff.* 845. *b.* 8. *c.* 6. *s.* 20. 2 *Heinec. b.* 2. *c.* 9. *s.* 202. *p.* 197. *Marten: L.N. b.* 8. *c.* 3. *s.* 11. *p.* 197. *Vatt. b.* 3. *s.* 196. *p.* 571. *Lee on Capt.* 72. It is true, however, that a right of possession, and an inchoate right of property, were acquired by the capture; but the right of possession being abandoned, it reverted to the original proprietor.

For the Defendant in error, it was answered: 1st, That the court has jurisdiction; 2d, That the court must restore the ship to the possession of the captor, whether the capture was legal or illegal; for they must consider every capture made in a war in form as valid.

1*st Point.* It is remarkable that the person who claims the exercise of the authority of the court, should except to its jurisdiction; but even by him, it is conceded, that the court may exercise a jurisdiction on the subject matter. This court has jurisdiction, if any court of the *United States* can take cognizance of the controversy; and if this court cannot hold plea of the dispute, it will not be pretended that any other court may. It is, then, an universal rule, without exception, that whoever pleads to the jurisdiction of a court, must shew another competent jurisdiction. *Doct. Plac.* 234. The only book read in support of the exception, (*Lee on Capt.* 77.) repels the Appellant's claim; for it is the principle, and not the mode, of adjudication, which forms the subject of the chapter referred to. *Lee on Capt.* 72. The original proprietor claims; the vendee says
p. 196 that he purchased from the captor; and the inference is | that the Judges cannot decide upon the legality of the prize, but must consider each belligerent party, the proprietor of what he has taken. The general principle is best exemplified in the justificatory memorial on the *Silesia* loan: the court of the captor is the proper court to decide the question of prize, or no prize; 1 *Magens. p.* 487. 490. 496. 505. but still the reason of the law must shew its extent. Not only the reason of the rule restricts its operation to the cases, where the question can be decided by the appropriate court of the captors; but the theoretical writers, as well as uniform practice, demonstrate the existence of such a restriction. If, likewise, the capture be made within neutral limits, an exception to the general rule arises. 2 *Wood.* 443. *Act of Congress of June,* 1794. The regulations established by the Executive Department, and the adjudications of this

court, concur in the position. Another exception arises, where neutral property of another nation, or of our own citizens, has been captured at sea, and is brought within our ports, *Glass et al. versus Betsey ant. p.* 9. 2 *Wood.* 439. *Bink. Q. j. p. l.* 1. *c.* 17. But if the sovereign will protect his citizen from injury, he must, also, compel him to do justice. Now, therefore, as no subject of a neutral State, can take from the captors the prizes which they have made, without violating their right of possession; 2 *Wood.* 455. 2 *Burr.* 693; it follows, that when such a case happens within our jurisdiction, the courts of the *United States* must decide between our citizens and the foreign captors; nor can the relief to the captors be refused, by the interposition of a claim on the part of the captured, as original proprietors. The order in which the claims of captor and captured have been filed, cannot vary the jurisdiction of the court; for, if the captured property is brought into port by our citizens, forcibly, or charitably, the jurisdiction must be the same, and the question of prize will be equally involved.

2*d Point.* But taking cognizance of the present case does not lead to a decision of the question of prize, or no prize; for, the court must consider the capture to be lawful. No neutral power can doubt the validity of a capture made in a public war. *Vatt. B.* 3. *c.* 14. *s.* 208. 1 *Wood.* 125. *Vatt. B.* 3. *c.* 3. *s.* 40. *s.* 190. *s.* 209. *s.* 212. *s.* 229. *Grot. B.* 3. *c.* 6. *s.* 2. *Burlem. ch.* 7. *s.* 12. 14. 2 *Wood.* 441. An inchoate right, therefore, a right to the possession, a special property, is enough for the captor. Of his possession, however slight, a neutral power cannot deprive him: if his enemy were still in pursuit; if he would have been recaptured the next moment; the neutral power cannot interfere with the possession, or, interfering, must restore it. 2 *Burr.* 696. 2 *Inst. of Just. tit.* 1. *s.* 17. *Dig. B.* 41. *tit.* 1. *law* 5. *s.* 7. 2 *Ruth.* 594. *B.* 2. *c.* 9. | *Collect. Jurid.* 134. 135. p. 197
In the present instance, the interference was charitable, yet if the vessel had been detained after payment, or tender of a reasonable salvage, the detainer would be deemed a trespasser; and the rule and remedy must be the same, as if he had been a trespasser *ab initio.* If the captors had abandoned their property, let all the legal consequences follow; but that is a question which the captors have a right to controvert with those who saved the property: The *British* claimants can certainly advance no title by *finding it.* The distinction between perfect rights, and inchoate rights, can only occur between a re-captor and the original owner, or between a vendee and the original owner: the authorities, that have been cited on the opposite side, are all of that description. *Martin.* 291. *Emerig.* 494. *Grot.* 582. *Puff.* 845. 2 *Heinec.* 197. 199; and the subject is so explained by the latest *English* writers. 2 *Wood.* 455. 6. The distinction, indeed, arises entirely out of the *jus postliminium*; and the very definition of that right shews its inapplicability to the present case. 'The right of

postliminium (says *Vatt. B.* 3. *c.* 14. *s.* 204.) is that in virtue of which persons and things taken by the enemy, are restored to their former state, when coming again under the power of the nation to which they belonged: but it can have no operation with regard to foreign or neutral nations.' 2 *Wood.* 443. *Vatt. B.* 3. *c.* 14. *s.* 208. Then, wherever a court takes cognizance of any original matter, it naturally draws to its jurisdiction, every incidental, or necessary, question. 3 *Bl. Com.* 106, 107, 108. Though where the Admiralty, or, as we contend, any foreign court, had not original jurisdiction, it shall not by the incidental occurrence of a question properly cognizable there, defeat the jurisdiction of the common law, or as we contend, the neutral court. It has been said, that in cases of prize between two other nations, the court of prize has jurisdiction; 3 *Bl. Com.* 108. where 2 *Show.* 232. *Comb.* 474. are cited; but the citation is incorrect; for the authority merely recognizes the general principle, that where the admiralty has jurisdiction of the original matter, it may, incidentally, try a question, not otherwise triable there. *Comb.* 462. and the case in *Show.* 232. is the celebrated case of *Hughes & Cornelius*, which merely says, that a foreign sentence is conclusive. *Raym.* 473. *S. C. Quod inconveniens est non licitum est*, is a good maxim applied to *new*, undecided, points. *Doug.* 388. Where the question of prize comes in collaterally, even a common law court may decide it, not operating as a sentence to bind the property of the goods. 2 *Wood.* 453. 454. 10. *Mood.* 77. 2 *Stra.* 1250. 2 *Burr.* 683. 1198. 1734. for, it is essential to the court that it may examine the question as far as is necessary for their purpose, though,
p. 198 generally considered, the question may be | reserved for exclusive jurisdictions. *Doug.* 588. *P. Buller. Harg. L. T.* 452. 1 *Lev. pl.* 2. *Roll. Abr.* 584. 21. *Vin. Abr.* 43. But, after all, the question of *abandonment*, is the only proper subject of controversy; and, if a right of possession ever attached, the abandonment of the prize can have no other effect, than if the captors had set fire to one of their own ships and abandoned her. The abandonment, if not done by choice, but from necessity, leaves the right unimpaired; and the vessel being brought into port by a friend, ought to be restored, on paying a reasonable salvage. *Lee on Capt.* 256. 257. *Molloy* 82. for, it will not interfere with the jurisdiction of any foreign court, as to the question of prize, that our courts should, in this case, assert a jurisdiction to make restitution to the captor.

BY THE COURT:—We are unanimously of opinion, that the District Court had jurisdiction upon the subject of salvage; and that, consequently, they must have a power of determining, to whom the residue of the property ought to be delivered.

In determining the question of property, we think, that immediately on the capture, the captors acquired such a right, as no neutral nation could justly impugn or destroy; and, consequently, we cannot say, that

the abandonment of the *Mary Ford*, under the circumstances of this case, revived and restored the interest of the original *British* proprietors.

Some doubts have been entertained by the court, whether on the principles of an abandonment by the *French* possessors, the whole property ought not to have been decreed to the *American* Libellants, or, at least, a greater portion of it by way of salvage ; but as they have not appealed from the decision of the inferior court, we cannot now take notice of their interest in the cause.

Upon the whole, let the decree be affirmed.

Geyer, et al. v. Michel, et al. and the ship Den Onzekeren.

(3 Dallas, 285) 1796.

THIS was a Writ of Error to the Circuit Court, for the District of *South Carolina* ; and, on the return of the record, the following pleadings appeared : |

On the 2d of *February*, 1795, A LIBEL was filed by the Plaintiffs in p. 286
error, stating, That the ship *Den Onzekeren* and her cargo, on the 16th of *November*, 1794, were, and ever since have been, the property of *Spooner* and *Springer*, and other citizens of the *United Netherlands*, owners and freighters of the same : That peace and amity subsisted between the *United States* and the *United Netherlands*, and that a treaty between the two powers, was concluded on the 8th of *October*, 1782, which is in full force : That the *Den Onzekeren* sailed with her cargo from *Demarara*, in the *West Indies*, bound to *Middleburg*, in *Holland*, and in the course of her voyage on the 16th of *November*, 1794, was captured on the high seas, in lat. 27, N. and long. 63, W. by a *French* armed ship, called the *Citizens of Marseilles*, commanded by Captain *Victor Chabert:* That the said armed ship pretended to be called the *Citizen of Marseilles*, was *fitted out, armed and equipped for war, in the port of Philadelphia, in the United States*, contrary to the laws of nations, &c. *that she went to sea, not having a legal commission to cruize* ; and that at the time of capturing the said ship *Den Onzekeren*, she was bound to *Cayenne*, to obtain a commission to cruize against the enemies of the *French* Republic : That the *Citizen of Marseilles* was *armed, equipped, and fitted out for war at Philadelphia, or some other place in the river or bay of Delaware, in Pennsylvania, New Jersey* or *Delaware*, contrary to the laws of neutrality, &c. That she was armed, equiped, and fitted out for war *while* in *Philadelphia, with* 12 *guns*, and *military stores equal to that force* ; but that after quitting the said *port*, to wit, in the *river of Delaware*, within the jurisdiction of the *United States*, her force was added to, and augmented by opening certain other port holes, and mounting certain other cannon, to wit, 16 guns, which she had concealed in her hold, and brought, or procured

to be brought from the port of *Philadelphia*; and by providing herself with other military stores, contrary to the laws of neutrality, &c.: That the Captain, officers, and crew of the said ship, *Citizen of Marseilles*, could not legally have any commission power or authority from any Prince or State, for a vessel fitted out, armed and equipped for war, in the *United States*; nor for a vessel whose force had been augmented in the *United States*, by adding to the number or size of her guns, or by addition thereto of any equipment solely applicable to war, much less could they have authority to carry and detain her prizes in the ports of the *United States*: That the said *Victor Chabert*, pretends to have a lawful commission from the *French* Republic, which the Libellants pray he may be obliged to shew and file; but which said pretended commission, (if any there be) having been issued to a vessel, then actually being fitted,
p. 287 armed | or equipped as aforesaid, or whose force had been augmented in the *United States*, is null and void: That the whole, part, or several of the crew of the *Citizen of Marseilles*, consisted of *American* citizens, or inhabitants, enlisted and shipped in the *United States*: That if the said armed ship had been legally commissioned previous to her entering the port of *Philadelphia*, the subsequent augmentation of her force in the *United States*, rendered her commission null and void, to all intents and purposes: And that the courts of the *United States* are bound to restore the prizes made by a vessel, whose force has been augmented within the neutral limits thereof. The libel, therefore, concludes, by praying restitution and damages.

On the 4th of *March*, 1795, a CLAIM, sworn to in open court, was filed by *John Michel*, prize master of the said ship *Den Onzekeren*, and her cargo, stiling himself a native *Frenchman*, and citizen of the *French* Republic, in behalf of himself, *Antonie Francois Planche*, a native *Frenchman*, now resident at *Philadelphia*, owner of the private armed vessel the *Citizen of Marseilles*; and in behalf of the officers, mariners, and crew, or persons interested in the said vessel of war, being all *French* citizens. After protesting that the said libel is vexatious, and not good and sufficient in law, the claim proceeds to state, That he, the said *John Michel*, the said *A. F. Planche*, and the officers and crew, and persons interested in the said ship *Citizen of Marseilles*, and her said prize, are all *French* citizens: That the said ship *Citizen of Marseilles*, is a *French* vessel, was not originally armed and equipped, or fitted for war at *Philadelphia*, or any other port or place of the *United States*, but she was fitted, armed, or equipped for war at *St. Domingo*, and was duly commissioned for war, under the authority of the *French* Republic, by *Monge*, Minister of the Marine Department, in *France*, by a commission issued at the *Cape*, as appears by a certified copy of the commission, of the said *Planche*, dated at on the day of

in the year of our Lord one thousand seven hundred and filed agreeably to the demand of the Libellant: And that the capture was made in open war, on the high seas, and without the neutral limits of the *United States*. To the claim was added, a plea of the 17th article of the Treaty of Amity and Commerce, between the *United States* and *France*, in bar to the libel; and a prayer that the libel be dismissed with costs and damages.

The Libellant filed A REPLICATION, in which, after the usual salvos and protestations, it was stated, that the force of the ship *Citizen of Marseilles*, was increased and augmented within the neutral limits of the *United States*, to wit, in the port of *Philadelphia*, and in the bay and river *Delaware*, by adding to the number of her guns, and by additions thereto p. 288 of certain gun carriages, and other equipments, solely applicable to war; by preparing for opening, and actually opening, certain port-holes on her main deck, abaft the main chains, and also opening other port-holes in her quarter deck, and adding to the number of her gun-carriages, and furniture and tackle for gun-carriages, in order to the mounting of other, and a greater number, of guns than she had mounted at the time of her arrival in the *United States*, or in the port of *Philadelphia*: That the crew of the said armed ship was not wholly *Frenchmen*, as stated in the answer, but was composed partly of native *Americans*, partly of *Englishmen*, *Irishmen* and *Scotchmen*, and other citizens of the *United States*: That the said pretended commission, a copy of which is exhibited, said to be given by *Monge*, Minister of Marine of the *French* Republic, but which appears blank as to its date, was not duly issued at *St. Domingo*, to the said *A. F. Planche*, but was illegally and improperly delivered and obtained in the *United States*, on condition of his, the said *A. F. Planche*, or the said *Victor Chabert*, repairing to some part of the *French* Republic to perfect the same: That the pretended commission marked B, pretended to be issued by *Liger Felicite Sonthonax*, and pretended to be dated the 30th of *September*, 1793, if ever it was really issued, is void and of none effect, the National Assembly of the *French* Republic having annulled all acts and authorizations given by the said *Santhonax*: And that, by the Respondent's own shewing, it appears by a certificate signed *Petry*, at *Philadelphia*, the 27th of *Vendemaire*, 3d year of the *French* Republic, (18th *October* 1795) that on a change of the commander of the said ship, the said *Victor Chabert* is expressly required to repair to some port of the Republic, for the purpose of perfecting the said blank commission first mentioned. The Libellant concluded with a demurrer to the plea of the 17th article of the treaty of amity and commerce between the *United States* and *France*, in bar; and repeats the prayer of the libel for restitution.

On the above pleadings a term probatory was obtained, several

witnesses were examined at *Charleston*, and a commission issued to certain commissioners in *Philadelphia* to examine other witnesses. The commission being executed and returned, the cause was argued, and the District Judge, on the 27th of *April* 1795, by his final sentence, decreed restitution of the ship *Den Onzekeren* and her cargo, with costs; but without damages, on the ground of augmentation of force only.[1]

[1] The decree of the District Judge, pronounced in the case of *Moodie et al. versus the Betty Cathcart et al.* (on a libel for restitution of a prize, owned by *British* subjects, and captured by the same privateer) proceeded upon the same facts, and, of course, decided the case reported. I have been favored with a copy of that decree, and, I presume, the insertion of it here, will be acceptable to the profession. In justice to the Judge, however, it is proper to premise, that new evidence was given to the Circuit Court, who reversed his decree.

BEE, *District Judge*. The cause before the court, and in which I am now about to pronounce my decree, is a cause of considerable importance, as well with respect to the *circumstances* of the case, as the value of the property. It will not be necessary for me to recite at length the whole of the pleadings, and arguments that have been adduced. The facts stated in the Libel, are partly admitted, and partly denied. The capture of the *Betty Cathcart*, on the high seas, out of the jurisdictional limits of the *United States*, and the property of the vessel and cargo as belonging to *British* subjects, are admitted on all hands. 'Tis *admitted* also, that at the time of the arrival of the *Citizen of Marseilles*, in *Philadelphia*, she was an armed ship, and had a commission to cruize against the enemies of *France*. An exception was taken to the commission on two grounds:

1. That all the commissions issued by Santhonax and Polverel, had been recalled.
2. That the certificate from Mr. *Petry*, the consul at Philadelphia, was only conditional.

The only points, then, which it is necessary for me to investigate, are:

1. Whether the force of this vessel was increased and augmented within the limits of the United States.
2. Whether such increase is a breach of the laws of neutrality and nations: and
3. What is required by the laws of neutrality in such cases, or whether the 17th article of the Treaty is a suspension thereof as to the United States.

On the 1st part, viz. whether the force of the *Citizen of Marseilles* was *encreased* and *augmented* within the United States. A number of witnesses have been examined, and a *variety* of other evidences adduced. The proofs in this cause have been very properly divided by *one* of the Counsel, into four classes or sets. I will, therefore, consider them in that order also.

The proofs which relate to the vessel at Cape Francois, before she sailed for Philadelphia.

2. Those which relate to her whilst *at* Philadelphia.
3. Those *after* she left the city, and *previous* to her going to sea.
4. Those immediately after she got to sea.

To the first point, Mr. Boisseau only speaks of her as an armed vessel generally, to the month of June, 1793, but does not specify *any* particulars.

W. Charrie, who was on board two days, about this period, speaks of her as an armed vessel, with ten ports on each side, and guns in them, and also as having guns in her hold—but no particular number. These are the only witnesses to this point.

If we proceed now to her appearance at Philadelphia, we find a contrariety of evidence.

General Stewart, in his letter to the Collector 3d of September 1794, mentions her as having at her *arrival* 16 nine and 10 six pounders; but he does not say, whether they were mounted or not. He says she will only mount 12 guns at going out, and carry the others in her hold. In his letter to the Secretary at War, dated the 14th October, 1794, he refers to the above, and also states the different reports of Mr. Milnor, one of the deputy inspectors of the port, to him. The first, on the 30th of September, 1793. He adds, that the ship arrived last autumn, with 16 nine and 10 six pounders, but will only mount 12 guns, which she *brought* in *that* situation—the others she is to carry in her hold. On the 14th of October, General Stewart

From this decree an appeal was interposed, and a writ of error was p. 289
issued out of, and returnable to, the Circuit Court, | which sat at *Columbia*, p. 290

visited her again, and says he finds no addition to the armament, she was reported, and had, on her arrival, viz. 10 six pounders on her main deck, and 2 on her quarter deck, and the rest of the guns in the hold. No new ports had been opened since her arrival. General Stewart does not say, who reported her thus, on her arrival. It could not be Mr. Milnor, for he, on the 14th of October, in his reports, says, 'Having examined the ship called the Citizen of Marseilles, on her arrival in port, I again examined her this day, and find no addition to her armament,' &c. The same number of guns are mentioned, that she had on her arrival. His other certificate which appears from General Stewart's letter to be dated on the 30th of September, 1793, and made to him, of the then actual armament of the ship that day, the day of her arrival—says—'boarded the privateer ship the Citizen of Marseilles, commanded by Planche, 12 six pounders *mounted* and 3 not mounted, with other warlike apparatus—46 men.' By comparing the dates and extracts in this exhibit, it plainly appears there is some mistake amongst the officers at that port. Mr. Milnor, on the 30th of September, 1793, the day she arrived, boarded her, and says she had 12 six pounders *mounted*, and 3 *not mounted*: he also visited her on the 14th of October, 1794, and found no addition to her armament, the same number of guns being mounted.

This evidence from the report of the officers of the port, clearly proves, that the ship, on her arrival, had *only* 12 guns mounted—how many others there were on board *not* mounted, must be left to the officers to settle, as I cannot do it from the evidence adduced. Mr. Harrison also fixed to 10 on her main deck, and 2 or 4 on her quarter deck. Michael Williams says, she had but 5 of aside on her main deck, and 2 on her quarter deck. John Grenion, who sailed in the vessel from the Cape to Philadelphia, says she had only 5 of aside on the main deck, and 1 on each side on the quarter deck, and that there were no more port holes open than guns.

Captain Montgomery, of the Revenue Cutter, who saw her at a distance at her first arrival, supposed her to have 10 ports of aside, but whether all real, or some painted, he could not say.

From the whole of this evidence, then, it clearly appears to me, that the ship at her arrival, had only 12 guns mounted, and *none* in her hold. If we now advert to the number of ports which were open either at her arrival, or at her leaving the *port* of Philadelphia; we find she had the same number as of guns *mounted*. All the evidences who were near her, swear positively, that there were *none* abaft the *main chains*—though several say the ports were framed within, but planked over on the outside. Harrison's evidence is conclusive—because *he* mentions his application to the governor for permission to *open more ports*, which was *refused*;—and Captain Chabert's reply that he did not wish to go contrary to the laws of the country, and that as he had carpenters of his own, he could open them elsewhere, and at another place, is fully sufficient to fix this point.

The 3d. class of evidence, is such as relates to the vessel after her leaving the city, and previous to her proceeding to sea.

And from a careful revision of this it does appear, that a number of ports were opened and guns mounted in the *river Delaware*. Quin swears positively to 14. Powel says, there were 3 carpenters at work to cut the ports through, and fit them—himself, Stevenson and another; and that *each* took *one* for a day's work. It could not therefore take more than five days to effect this, and from the latter end of October to the 4th of November, there was sufficient time to compleat it.

The evidence of these two witnesses has been impeached in several particulars, but it really appears to me, that there are so many proofs and circumstances stated, that corroborate their testimony to most of the points they speak of, that there is not sufficient ground for me to repel the evidence they have given *in toto*.

The witnesses who prove the increase of force in the river, are Quin, who says she mounted 28 guns—Captain Montgomery says 26 or 28.—Mr. Kevan says, a whole tier fore and aft. All then speak of the vessel down the river, and before she went to sea.

The 4th and *last* class, is that relative to her, immediately after her going to sea.

One of the counsel for the claimant objected to the testimony of all the witnesses on board the prize, as being *interested* and of course incompetent, but he could not be serious in this, because the constant uniform practice of the civil law courts has

on the 12th of *May*, 1795. On the return of the record, a commission was
p. 291 issued to certain commissioners | at *Philadelphia*, to examine witnesses in

been to admit such evidence to certain points—In *Collectanea Juridica* page 135 is the famous case so often resorted to as fixing the law. In this case, it is expressly laid down, that the evidence to *acquit* or *condemn*, must, in the first instance, come from the *vessel taken*, the persons on board, and the *examination on oath* of the *master* and other *officers*.

The evidence they all give is reducible to two points,

1st. The appearance and force of the ship both as to guns and men.

2d. The *intelligence* obtained *from* the crew. As to the last, I think little attention should be paid to the chit chat on board one of these privateers, and very frequently the witnesses don't understand the language they hear spoken, and report from second hand : but they certainly are competent witnesses as to the number of *guns* and crew that were on board at the time of the capture ; and in this they all agree, that she mounted 28 guns, when she took the Den Onzekeren, out of which she took two guns to make 30, and several of them say, she could mount 34 guns, having ports cut for that number.

Captain Raymon Sanchez, Captain of the brig Dichoso, taken on the 6th of November, two days after the vessel left the Delaware, says she mounted 28.

Lemuel Janson, of the Den Onzekeren, says, she mounted 28 guns. Jacob Vix, a sailor on board the Dutch ship, says the same. John Hallrick, seaman on board the Betty Cathcart, says the same. Charles M'Donald, mate of this ship, says she had 28 guns on the 11th of November, when they took him.

Hans Evertson, mate of the Den Onzekeren, taken the 16th of November, says she had then 28 guns mounted.

Adrianus Pappagaay, the doctor of the Dutch ship, says she had 28 guns. Here then is such concurrent testimony of the increased force of this vessel, that it is impossible not to admit it ; and if admitted, it carries with it the most unequivocal proof that the ship the Citizen of Marseilles, did encrease her force of guns *mounted* and *prepared for use within* the territory of the United States :—There was no positive proof as to the new gun-carriages being actually carried on board ; neither was there any of their being on board when she first arrived. Mr. Harrison mentions the repairing of some, and where old ones were rotten, the replacing them. If this was solely for those guns that were actually mounted at her arrival—I see nothing against it—it could not be called an augmentation of her force—neither is there any evidence sufficient to convince my mind that the crew of the Citizen of Marseilles, at her going out was increased, or if increased, in any way that could be said to infringe our neutrality. Though some of the evidences say they were not all native Frenchmen from their language, yet they all agree that the strength of the crew were so, the others were a mixture, there is no proof of any one American citizen being on board, unless Quin was ; as to other nations, I know of no right we have to controul their seamen. The 27th article of our treaty with Holland, which, by the 3d article of the treaty with France, in my opinion is confirmed to *them* also, admits the carrying away seamen or other natives or inhabitants of the respective nations on board of any of their vessels, whether of merchandize or war.

From a *careful review* of the evidence produced in *this* cause, it appears *clearly to me* that the ship Citizen of Marseilles, at her arrival in Philadelphia, mounted only 12 guns and had *others*, but the precise number is not *ascertained*, in her *hold* : that at the time of her leaving the river, she had 26 or 28 mounted : That captain Chabert having been refused permission to open new ports in Philadelphia, and declaring he did not wish to infringe the laws, and having afterwards done so within the territories of the United States, could not and does not plead ignorance as an excuse. Whatever he did was with his eyes open, and being forewarned, he must abide the consequences.

It remains now for me to enquire into the law arising from the foregoing facts, and the power and duty of this court thereupon.

There cannot be a doubt that if a prosecution was instituted against Capt. Chabert, or any of the persons concerned in increasing, augmenting, or *procuring* to be increased or augmented, the force of the vessel, under the act of June last, but that a conviction must follow. There a penalty of fine and imprisonment is declared, as a punishment for a breach of the sovereignty and neutrality of the United States, and this by a *municipal* law of our own : but what does the *law* of *nations* require

the cause, and the hearing was adjourned to the next Circuit Court, which | sat at *Charleston*, on the 25th of *October* following. At that Term, the p. 292 commissioners having made return of their proceedings, | the Circuit Court, p. 293 after a hearing, on the new evidence, reversed the decree of the District Court.

On the decree of the Circuit Court, the present writ of error was brought; and the following facts appeared from the evidence, and exhibits, transmitted with the record:

The *Citizen of Marseilles* had arrived from *Marseilles*, at the *Cape*, in the month of *June*, 1793, at which time she was armed, having ten port-holes on each side of the main-deck, and a number of cannon in her hold. It was soon afterwards proposed, to employ the vessel in carrying certain deputies of the *Colony* to *France*; and with that view, her warlike equipments were encreased, and the Captain received a commission, signed in *Paris*, by the Minister of Marine, but not dated, with an authorisation endorsed by *Santhonax*, the Civil Commissary of the Republic, at the *Cape*, and by *Petry*, the French Consul at *Philadelphia*.[1] |

further? I have in the course of the last summer, delivered my opinion on this question so fully in this court, that I need only now repeat some part of the law then laid down. In the case of *Jansen versus Talbot*, I stated that this court, by the law of nations, has jurisdiction over captures made by foreign vessels of war, of the vessels of any other nation, with whom they are at war, *provided* such vessels were *equipped* here, in breach of our sovereignty and neutrality, and the prizes are brought *infra præsidia* of this country. By the law of nations, no foreign power, its subjects or citizens, has any right to erect castles, inlist troops, or equip vessels of war in the territory or ports of another. Such acts are breaches of neutrality, and may be punished by seizing the persons and property of the offenders. Vessels of war *so* equipped, are *illegal ab origine*, and no prizes they make will be legal as to the *offended power*, if brought *infra præsidia*. The seizure and restoration of such prizes are what the laws of neutrality justly claim. You must either permit both parties to equip in your ports, or neither. Should either equip without *your* consent, the *least* you can *do*, is to divest them of the prizes they may have thus *illegally* taken, and restore them to the other party, or else permit them to equip also. This cause and this decree were submitted to the Circuit Court, in October last, and there affirmed. An appeal to the Supreme Court is still undetermined, but until this opinion is overruled by *that* tribunal, I hold myself bound to consider it as a law *.

I gave a like decision lately, in the case of the schooner Nancy, from a full conviction that the principles I laid down formerly, were founded on the rules of *propriety* and the laws of nations.

[1] It may be useful to illustrate this case, as well as to gratify curiosity at a future period, to subjoin a copy of the commission and endorsements, which are in these words:—

Copie de la Commission en guerre, du Navire le Citoyen de Marseille, Capitaine Victor Chabert pour servir de Commission pour le conducteur de la prize Hollandoise nommée *Den Onzekeren* Cap. Laurent Hertensvelt venant de Essequebo et Demerary, allant à Middleburg.

LIBERTE MARINE FRANCOISE EGALITE

Le Conseil Exécutif de la République Françoise permet par ces présentes au Cap. Planche, de faire armer et equiper en guerre un batiment nommé Le Citoyen de Marseille du port de 400 tonneaux ou environ, actuellement au port de la ville du Cap, avec tel nombre de Canons, Boulets, et telle quantité de poudre, plomb,

* See *Talbot versus Jansen*, p. 92, *ante*.

p. 294 About the end of *September*, 1793 (a few days before her sailing) she had 28 guns mounted, 20 on her main-deck, 6 on her quarter-deck, and

et autres munitions de guerre et vivres qu'il jugera nécessaire pour le mettre en état de courir sur les pirates, forbans, gens sans aveu et gènèralement tous les ennemis de la Republique Françoise, en quelques lieux qu'il pourra les rencontrer et les prendre et amener prisonniers avec leurs navires, armes, et autres objets dont ils seront saisis ; à la charge par le dit Planche, de se conformer aux ordonnances de la marine et aux loix décretées par les Representans du Peuple François, et notamment à l'Article IV. de la Loi du 31. Janvier, concernant le nombre d'hommes devant former son Equipage, de faire enregistrer les presentes lettres au Bureau des Classes du lieu de son depart, d'y deposer un Role signé et certifié de lui, contenant les noms, surnoms, age, lieu de naissance et demeure des gens de son équipage, et à son retour, de faire son rapport pardevant l'officier chargé de l'Administration des Classes de ce qui se sera passé pendant son voyage.

Le conseil Executif provisoire requiert tous peuples, Amis, ou Alliés de la Republique Françoise, et leurs Agents, de donner au dit Planche, toute assistance, passage, et retraite en leurs ports avec son dit vaisseau, et les prises qu'il aura pu faire, offrant d'en user de même en pareilles circonstances, mande et ordonne aux Commandants des batimens de L'Etat de laisser librement passer le dit Planche avec son vaisseau et ceux qu'il aura pu prendre sur l'ennemi, et de lui donner secours et assistance.

En foi de quoi le Conseil Executif provisoire de la Republique a fait signer les presentes lettres par la Ministre de la Marine et y a fait apposer le sceau de la Republique.

Donné à Paris le jour du mois de mil sept cent quatre vingt treize, l'an de la Republique Françoise

Signé, Monge à l'original.

Par le Ministre de la Marine.

Signé, Cottrau à l'original.

(AU DOS EST ECRIT.)

Nous, Leger Felicité Sonthonax Commissaire Civil de la Republique, délégué aux Isles Françoises de L'Amérique sous le vent pour y retablir l'ordre et la tranquillité publique.

En vertu des pouvoirs qui nous ont été délégués par la lettre du Ministre du 13. 9bre. 1792 en consequence de la loi du même mois.

Permettons à Planche d'armer en course et courir sur les ennemis de la Republique Françoise en quelques lieux qu'il pourra les rencontrer. La presente bonne et valable, à la charge par lui de se conformer en tous points aux ordres du Conseil Executif de la Republique et à toutes les Loix Maritimes non abrogées et notamment à celle de 1681.

Fait au Cap le 30 Septembre 1793, L'An 2eme. de la Republique.

Signé, Sonthonax à l'original.

Par le Commissaire Civil de la Republique

Signé, Gault à l' original.

S. adjt. de la Con. Civile.

Je soussigné Jn. Bte. Petry, Consul de la Republique Françoise à Philadelphie, Etat de Pennsylvanie, certifie à tous ceux qu'il appartiendra que le citoyen Antoine François Planche dénommé dans la présénte lettre de marque, est resté dans cette ville et que le Capne. Victor Chabert le remplace pour commander le navire Le Citoyen de Marseille, Permis à lui en consequence de s'en servir contre les ennemis de la République, ainsi que pour se rendre dans un port de la dite République.

En foi de quoi j'ai délivré ces présentes aux quelles j'ai apposé le scel consulaire, le vingt sept Vendemiaire L'An 3me. de la République Françoise une et indivisible.

Signé, Petry à l'original.

Je soussigné, Capitaine du navire armé Le Citoyen de Marseille, ai délivré la présente copie de ma commission en guerre, pour servir seulement de conduite de prise au Cen. Jean Michel, Conducteur de la prise Hollandoise Den Onzekeren, venant d'Esequebo et Demerary, dont étoit maitre Laurent Harteensvelt du Port et Havre de Middleburg, et la dite prise faite par moi soussigné Capne. du dit navire arrivé à la hauteur de 28 dégrés 5 minutes de lattitude Nord et 62 dégrés 20 minutes de longitude Occidentale, Meridien de Paris—Fait en mer à bord de mon navire armé le 26 Brumaire l'an 3eme. de la Republique Françoise une et indivisible. (16. 9bre, 1694. V. Stile.)

Signé, Chabert, sur la dite Copie.

2 on her fore-castle. Her destination, however, being suddenly changed, (the deputies taking another conveyance, and the commissioners putting the vessel in requisition, to carry 3 or 400 sick and wounded Frenchmen to *America*,) an immediate alteration was made, and her warlike equipments were rendered subservient to the accommodation of passengers. A partition was made before the main-mast, the 5 port-holes abaft, were planked up, to make room for passenger's births, the 5 shutters were fixed to a corresponding number of port-holes on each side, the iron guns were removed where the shutters had been put up, and wooden guns were substituted; so that on the whole, she had, externally, an appearance p. 295
of the same force, that existed before the alteration, namely, 12 iron, and 16 wooden guns mounted. The number of iron guns in her hold, when she left the *Cape*, was from 12 to 16. On her approaching the American coast, she dismounted some of the wooden guns, for the conveniency of heaving the lead, and deposited them in the hold, leaving only 10 iron guns on the main-deck, and 2 on the quarter-deck. When she arrived in the bay of *Delaware*, she was taken for a vessel of war, with a compleat tier of guns on each side; and the official certificates of the surveyor and inspector of the port, (though there was some apparent, but no real, difference between them, as the one referred to the actual armament of the vessel, and the other included the guns dismounted) represented her as arriving with 12 cannon mounted, and a number of cannon in her hold. Soon after her entering the port, the Captain applied to a ship carpenter to open the port-holes, which had been shut up at the Cape; but, having consulted the Governor, he declined to do that, or any other thing, which was calculated to augment the warlike force of the vessel. She was, however, dismantled at one of the wharves, 24 guns were landed from her, two remained in the hold, and two were lashed to the fore-castle; and, in the course of her general repairs, the state-rooms were knocked down, the vessel was caulked all over, her old gun-carriages were repaired, some new gun-carriages were made, by her own carpenters, in the room of an equal number of old ones, that were broken to pieces, the eye-bolts, for fixing the gun-tackle, were taken out and re-placed, and she was furnished with a new mast. The vessel sailed from *Philadelphia*, publicly, at noon, and gave three cheers on her departure. The officers of the port, and several other witnesses declared, that she departed in the same apparent state of warlike force, as she exhibited on her arrival: the same number of guns being mounted, and the same number deposited in her hold.—Two witnesses (of very doubtful credit) declared, that on her passage down the river, she took on board, swivels, gun-carriages, and mariners; that they assisted in opening the port-holes, that very few real Frenchmen belonged to her crew, and that part of them were enlisted in *Philadelphia*. But other witnesses declared, that the vessel only re-

placed her wooden guns in the river; that although some of the crew joined her below, it was customary to do so; and that the crew consisted principally of Frenchmen, though there were men of a variety of nations on board. After the vessel had left the capes, she began immediately to open all the port-holes, and to mount the guns that had been deposited in the hold. She was visited by an American ship, while thus employed;
p. 296 and all her guns were | mounted, at the time of her taking other prizes; the Captain of one of them representing, indeed, in a protest, made *ex parte*, that she mounted upwards of 30 guns; and the American visitor stating, that the gun-carriages had been just painted, and were, together with their tackle, apparently new.

The case was argued, by *E. Tilghman* and *Lewis*, for the Plaintiffs in error, and by *Ingersoll*, *Dallas*, and *Du Ponceau*, for the Defendant.

By *the former*, it was contended, that the vessel had not a competent, legal, commission; that the force of the vessel was augmented in the port of *Philadelphia*, by encreasing the number of her guns, and gun-carriages, by opening new port-holes, and by enlisting American citizens: and, that even, if the facts were doubtful, as to all the other points, it was incontrovertible, that new gun-carriages had been substituted for old ones, which was an unequivocal alteration and augmentation in a matter solely applicable to war.

By *the latter*, it was answered, that the commission was valid; that in point of fact, there was no evidence of any augmentation of the force of the vessel, by cannon or mariners; that the substitution of new, for old gun-carriages, was a mere re-placement, not an augmentation of force; and that, in point of law, an augmentation of the force of a French ship of war, within the jurisdiction of the *United States*, is not sufficient (according to our municipal law, or to the law of nations) to annihilate her warlike character, and to destroy the conventional right of asylum for herself and her prizes.

After consideration, THE COURT were unanimously of opinion, that the decree of the Circuit Court ought to be affirmed; but the Judges did not assign their reasons.[1]

The decree of the Circuit Court affirmed.

Moodie v. the ship Alfred.

(3 Dallas, 307) 1796.

THE allegation in this case, as supported by the evidence, was, that the privateer, which took the *British* prize in question, had been built in *New York*, with the express view of being employed as a privateer, in case the then existing controversy between *Great Britain* and the *United States* should terminate in war; that some of her equipments were calcu-

[1] See *post*. *Moodie versus the Phœbe Anne.*

lated for war, though they were also frequently used by merchant ships; —that the privateer was sent to *Charleston*, where she was sold to a *French* citizen;—that she was carried by him to a *French* island, where she was completely armed and equipped, and furnished with a commission; —and that she afterwards sailed on a cruize, during which the prize was taken, and sent into *Charleston*.

Reed, for the Plaintiff in error, contended that this was an original construction or out-fit of a vessel for the purpose of war; and that if it was tolerated as legal, it would be easy by collusion to subvert the neutrality of the *United States*, and involve the country in a war.

THE COURT, however, without hearing the opposite Counsel, directed The Decree to be affirmed.

Moodie v. the ship Phœbe Anne.

(3 Dallas, 319) 1796.

ERROR from the Circuit Court for the District of *South Carolina*.

The *Phœbe Anne*, a *British* vessel, had been captured by a *French* privateer, and sent into *Charleston*. The *British* Consul filed a Libel, claiming restitution of the prize, upon a suggestion, that the privateer had been illegally out-fitted, or had illegally augmented her force, within the *United States*. On the proofs, it appeared, that the privateer had originally entered the port of *Charleston*, armed and commissioned for war; that she had there taken out her guns, masts, and sails, which remained on shore, till the general repairs of the vessel were completed, when they were again put on board, with the same force, *or thereabouts*; and that, on a subsequent cruize, the prize in question was taken. The decrees in the District and Circuit Courts were both in favor of the captors; and on the return of the record into this court, *Reed*, having pointed out the additional repairs, argued, generally, on the impolicy and inconveniency of suffering privateers to equip in our ports.

ELSWORTH, *Chief Justice*. Suggestions of policy and conveniency cannot be considered in the judicial determination of a question of right: the Treaty with *France*, whatever that is, must have its effect. By the 19th article, it is declared, that *French* vessels, whether public and of war, or private and of merchants, may, on any urgent necessity, enter our ports, and be supplied with all things needful for repairs. In the present case, the privateer only underwent a repair; and the mere re-placement of her force cannot be a material augmentation; even if an augmentation of force could be deemed (which we do not decide) a sufficient cause for restitution.

BY THE COURT: Let the decree of the Circuit Court be affirmed.[1]

[1] See p. 137. *ant. Geyer et al. versus Michel et al.* and the ship *Den Onzekeren*.

Hills et al. v. Ross.

(3 Dallas, 331) 1796.

THIS cause came again before the court [*see* 3 Dallas, 184] and after a discussion upon the merits, it became a question, whether there had been a regular appearance of the parties to the suit below? The libel was filed by the *British* Consul, on behalf of *Walter Ross*, against *Hills*, *May* and *Woodbridge* (who formed a partnership in *Charleston*, under that firm) and *John Miller*. The plea was headed, 'the plea of *Ebenezer* Hills, one of the company of *Hills*, *May*, and *Woodbridge*, in behalf of himself and his said copartners, who are made Defendants in the libel of *Walter Ross*;' and concluded with praying, 'on the behalf aforesaid, to be dismissed, as far as respects the said *Hills*, *May* and *Woodbridge*.' The replication regarded the plea of *Hill*, as the plea of all the company; and the rejoinder was signed by '*Joseph Clay*, junior, Proctor for the Defendants.' The decree below was against all the Defendants, and the writ of error was issued out in all their names; but there was evidence on the record, that *May* had been in *Europe*, during the whole of the proceeding, and no warrant of attorney, or other authority, to appear for him, was produced.

Ingersoll, contended, for the Plaintiffs in error, that partners had not power to appear for each other to suits; and that, in fact, nothing appeared on the record to shew that they had done so, on the present occasion.

Tilghman, on the contrary, relied upon the rejoinder, where the Proctor states himself to be employed by all the Defendants; and insisted, that his authority could not be denied, or examined, particularly in this stage of the cause, and in this form of objection.[1]

p. 332 On the 11th of *August*, the CHIEF JUSTICE delivered the opinion of the COURT, that, in the present case, there was a sufficient legal appearance of all the Defendants.

On the merits, it appeared, that the Plaintiffs in error, had directed to be sold, certain prize cargoes, captured by Captains *Talbot* and *Ballard*, under the circumstances, stated in the case of *Jansen versus Talbot*, *ant. p.* 92; and that, after notice of the claims filed by the owners of the prizes, they had received and paid over the proceeds to the captors:

[1] IREDELL, *Justice*. The doubt is, whether in a case like the present, one partner can authorise a proctor to appear for the whole company?

CHASE, *Justice*. This court cannot affirm the decree, against persons who were not before the court that pronounced it; and the record must shew, that they actually did appear. A bare implication, the titling of the plea, or a general statement, that one of the partners acts on behalf of them all, is not sufficient: For, though partners, in a course of trade, may bind each other; they cannot compel each other to appear to suits, nor undertake to represent each other in courts of law. What, however, is the legal effect of an appearance by a Proctor, an officer of the court, is another ground that merits consideration.

but, in so doing, they had acted merely as commercial agents, without any share in the ownership of the privateers, or any participation in the direction or emoluments of their illicit cruizing. The principal questions, therefore, were, 1st. Whether, in point of fact, the Plaintiffs had notice of the claims of the original owners of the prizes? And 2d. Whether, after paying over the proceeds of the cargoes, they were responsible to the claimants for any thing, and for how much?

BY THE COURT: It appears, that the damages have been assessed in the courts below, in relation to the value of the goods that were captured: but the Plaintiffs in error were not trespassers *ab initio*; and, acting only as agents, they should be made answerable for no more than actually came into their hands. The accounts of sales are regularly collected and annexed to the record. We are, therefore, at no loss for a criterion: And we think that the decree should be so modified, as to charge them with the amount of sales, after deducting the duties on the goods, if the duties were paid by them.

The Decree was in the following words:—ORDERED, That the decree of the Circuit Court for *Georgia* district, pronounced on the 5th of *May*, 1795, be reversed, so far as the same respects the said *Hills, May and Woodbridge*; and it is further ordered, that the said *Hills, May and Woodbridge*, pay to the said *Walter Ross*, thirty-two thousand and ninety dollars and fifty-eight cents, the net amount of the sales of the cargo of the said ship, and five thousand six hundred and five dollars and twelve cents, interest thereon, from the 6th day of *June* 1794, to the twelfth day of *August* 1796, making together the sum of thirty-seven thousand six hundred and ninety-five dollars and seventy cents, and that the said *Hills, May* and *Woodbridge*, do pay the costs of suit—and a special mandate, &c.

Del Col v. Arnold.

(3 Dallas, 333) 1796.

A LIBEL was filed in the District Court of *South Carolina*, by the Defendant in error, against *Del Col*, and others, the owners of a *French* privateer called *La Montagne*, and of the ship *Industry* and her cargo, a prize to the privateer, lying in the harbour of *Charleston*, which the Libellant had caused to be attached. The case appeared to be briefly this:—The privateer had captured, as prize, on the high seas, an *American* brig called the *Grand Sachem*, commanded by *Ebenezer Baldwin*, and owned by the Defendant in error. At the time of taking possession of the brig, a sum of 9993 dollars was removed from her into the privateer, a prize-master and several mariners were put on board of her, and they were directed to steer for *Charleston*. Just, however, as they hove in

sight of the light-house, the *Terpsichore*, a *British* frigate, captured the privateer, and gave chace to the prize: whereupon the prize-master run her into shoal water, and there she was abandoned by all on board, except a sailor originally belonging to her crew, and a passenger. In a short time, she drove on shore, was scutled and plundered. When the Marshal came, with process against the brig, she was in the joint possession of the Custom-house Officers, and the privateer's men; the latter of whom prevented the execution of the process. The *Industry* and her cargo were then attached by the Libellant, and an agreement was entered into between the parties, that they should be sold, and the proceeds paid into court, to abide the issue of the suit.

On the evidence, it appeared, that the *Grand Sachem*, had been engaged in a smuggling trade at *New Orleans*, the *Spanish Main*, &c. and for the purpose of carrying it on, she had procured a register in the name of a *Spanish* subject, and sailed under *Spanish* colours. Besides other suspicious circumstances, she had on board, at the time of her capture,
p. 334 a variety of | accounts describing her as *Spanish* property; and a trunk containing her papers (among which, it was alledged, there was a *Spanish* register) had been collusively delivered up to the owner, the Defendant in error, by one of the sailors. The money removed from her, and taken in the privateer by the *British* frigate, had been condemned in *Jamaica*.

The District Court pronounced a decree, in favor of the Libellant, for the sum of 33,329 dollars 87 cents (the full value of the *Grand Sachem*, and her cargo) with interest at 10 per cent. from the 8th of *August*, 1795, the day of capture; declared 'that the proceeds of the ship *Industry* and her cargo, attached in this cause, be held answerable to that amount;' and directed, that the Defendant in error should enter into a stipulation to account to the Plaintiffs in error, for the money condemned as prize to the *British* frigate, or any part of it, that he might recover, as neutral property. This decree was affirmed, in the Circuit Court, and thereupon the present writ of error was instituted.

The case was considered in four points of view:—1st. Whether there was sufficient probable cause for seizing and bringing the *Grand Sachem* into port for further examination, and adjudication? 2d. Whether, if there was such sufficient cause, the captors can, at all, be made liable for the consequent injury and loss? 3d. Whether if the immediate captors, who run the vessel into shoal water, and scutled her, are responsible, that responsibility can be devolved on the owners of the privateer, who had not authorised, or contributed to the misconduct? And 4th. Whether the *Industry* and her cargo could, before condemnation, be attached, and made liable in this suit, as the property of the captors?

The first and second points were argued, at the last Term, by *Dallas* and *Reed* (of *South Carolina*) for the Plaintiffs in error, and by *Pringle*

(of *South Carolina*) for the Defendant: and the third and fourth points were argued at the present Term, by the same counsel for the Plaintiffs in error, and by *Ingersoll* and *Lewis* for the Defendant.

THE COURT delivered, at different times, the following opinions:

On the *first* point, that there was a sufficient probable cause for seizing and bringing the *Grand Sachem* into port.

On the *second* point, that the right of seizing and bringing in a vessel for further examination, does not authorise, or excuse, any spoliation, or damage, done to the property; but that the captors proceed at their peril, and are liable for all the consequent injury and loss.

On the *third* point, that the owners of the privateer are responsible for the conduct of their agents, the officers and crew, | to all the world; p. 335
and that the measure of such responsibility is the full value of the property injured, or destroyed.[1]

On the *fourth* point, that whatever might, originally, have been the irregularity in attaching the *Industry* and her cargo, it is compleatly obviated, since the captors had a power to sell the prize; and by their own agreement, they have consented that the proceeds of the sale should abide the issue of the present suit.

The decree of the Circuit Court affirmed.

Talbot v. the ship Amelia, Seeman, Claimant.

(4 Dallas, 34) 1800.

ERROR from the Circuit Court of *New York*. It appeared on the record, that Capt. *Talbot*, of the frigate *Constitution*, having re-captured the *Amelia*, an armed *Hamburgh* vessel, which had been captured by a *French* national corvette, and ordered to *St. Domingo*, for adjudication, brought her into the port of *New-York*. A libel was thereupon filed in the District Court by the re-captor, setting forth the facts, and praying that the vessel and cargo might be condemned as prize; or that such other decree might be pronounced as the Court should deem just and proper. A claim was filed by *H. F. Seeman*, for *Chapeau Rouge* & Co. of *Hamburgh*, the owners, insisting that the property had not been changed by the capture, and praying restitution with damages and costs. The *District Judge*, HOBART, decreed one-half of the gross amount of sales of ship and cargo, | without deduction, (a sale having been made by consent) p. 35
to be paid to the re-captors, in the proportions directed by the act of congress for the government of the navy; and the other half, deducting all costs and charges, to be paid to the claimants. The cause was brought

[1] CHASE, and IREDELL, *Justices*, agreed that the owners were responsible, but differed as to the extent, observing that the privateer's men were justifiable in abandoning, to save themselves from captivity; but that the removal of the money into the privateer, and the subsequent scutling of the brig, were unlawful acts.

by appeal before the Circuit Court, WASHINGTON, *Justice*, presiding, who reversed the decree of the District Court, so far as it ordered payment of one half of the gross sales to the re-captors, 'considering that as the nation 'to which the owners of the said ship and cargo belong, is in amity with 'the *French* republic, the ship and cargo could not, consistently with the 'laws of nations, be condemned by the *French* as a lawful prize; and 'that, therefore, no service was rendered by the *Constitution*, or by the 'commander, officers, or crew thereof, by the re-capture aforesaid;' and affirmed the rest of the decree. On the decree of the Circuit Court the present writ of error was instituted; and the following statement of facts made a part of the record by consent.

'The following case is agreed upon by the parties, to be annexed to 'the writ of error in this cause, viz.

'The ship *Amelia* sailed from *Calcutta*, in *Bengal*, in the month of '*April* 1799, loaded with a cargo of the produce and manufactory of that 'country, consisting of cotton, sugars, and dry goods, in bales, and was 'bound to *Hamburgh*.

'On the sixth of *September* in the same year the same was captured, 'whilst in the pursuit of her said voyage, by the *French* national corvette '*La Diligente, L. I. Dubois*, commander, who took out her captain and 'part of her crew, together with most of her papers, and placed a prize 'master and *French* sailors on board of her, ordering the prize master to 'conduct her to *St. Domingo*, to be judged according to the laws of war. 'On the fifteenth of the same month of *September*, the *United States* ship 'of war, the *Constitution*, commanded by *Silas Talbot*, Esquire, the 'libellant, fell in with, and re-captured, the *Amelia*, she being then in full 'possession of the *French*, and pursuing her course for *St. Domingo*, according to the orders received from the captain of the *French* corvette.

'At the time of the re-capture, the *Amelia* had eight iron cannon 'mounted, and eight wooden guns, with which she had left *Calcutta*, as 'before stated.

'From such of the ship's papers as were found on board, and the 'testimony in the cause, the ship *Amelia*, and her cargo, appear to have 'been the property of *Chapeau Rouge*, a citizen of *Hamburgh*, residing, 'and carrying on commerce, in that place. It is conceded that the 'republic of *France* and the city of *Hamburgh* are not in a state of hostility 'to each other, and that *Hamburgh* is to be considered as neutral between 'the present belligerent powers. |

p. 36 'The *Amelia* and her cargo, having been sent by captain *Talbot* to '*New-York*, were there libelled in the District Court, and such proceedings 'were thereupon had in that Court, and the Circuit Court for that district, 'as may appear by the writ of error and return.

'*Alexander Hamilton*, of counsel for plaintiff in error.

'*B. Livingston*, of counsel for defendant in error.'

The cause was argued on the 11th, 12th, and 13th of *August* 1800, by *Ingersoll* and *Lewis*, for the plaintiff in error; and by *M. Levy* and *Dallas*, for the defendant in error. The general points of the discussion were these:

1st. Whether the *Amelia* could be considered, at the time of the re-capture, as *a French armed vessel*, within the meaning of the act of congress, which authorises the seizure of *French* armed vessels? 4 *vol. p.* 120.

2d. Whether captain *Talbot* was authorised to make a *re-capture*, the *Amelia* belonging to a power, equally in amity with the *United States*, and with *France*?

3d. Whether, on positive statute, or general principles, a salvage was due to the re-captors, for rescuing the *Amelia* from the *French*?

On the 18th of *August*, PATERSON, *Justice*, stated, that it was the wish of the COURT to postpone the cause for further argument, before a fuller bench. It was, accordingly, argued again at *Washington*, in *August* term 1801, by *Ingersoll* and *Bayard* (of *Delaware*) for the plaintiff in error; and by *M. Levy*, *J. T. Mason* (of *Maryland*) and *Dallas* for the defendant in error. And MARSHALL, *Chief Justice*, delivered the judgment of the Court, 'that the decree of the Circuit Court was correct, in reversing 'the decree of the District Court, but not correct in decreeing the restora-'tion of the *Amelia*, without paying salvage. This Court, therefore, is 'of opinion, that the decree, so far as the restoration of the *Amelia* without 'salvage is ordered, ought to be reversed: and that the *Amelia* and her 'cargo ought to be restored to the claimant, on paying for salvage one-'sixth part of the net value, after deducting therefrom the charges, which 'have been incurred.'[1]

Bas, Plaintiff in Error, v. Tingy, Defendant in Error.

(4 Dallas, 37) 1800.

IN error from the Circuit Court for the district of *Pennsylvania*. On the return of the record it appeared, by a case stated, that the defendant, in error, had filed a libel in the District Court, as commander of the public armed ship the *Ganges*, for himself and others against the ship *Eliza*, *John Bas*, *master*, her cargo, &c. in which he set forth that the said ship and cargo belonged to citizens of the *United States*; that they were taken on the high seas by a *French* privateer, on the 31st of *March*, 1799; and that they were re-taken by the libellant, on the 21st of *April* following, after having been above ninety-six hours in possession of the captors.

[1] A full report of the arguments, on the first hearing of this cause, was prepared; but they are found so ably incorporated with the arguments on the second hearing, in Mr. *Cranch's* Reports, that it has been thought unnecessary to publish it in this volume. 1 *Cranch. Rep.* 1.

The libel prayed for salvage conformably to the acts of congress; and the facts being admitted by the answer of the respondents, the District Court decreed to the libellants one half of the whole value of ship and cargo. This decree was affirmed in the Circuit Court without argument, and by consent of the parties, in order to expedite a final decision on the present writ of error.

The controversy involved a consideration of the following sections in two acts of congress: By an act of the 28th of *June* 1798, (4 *vol. p.* 154. *s.* 2.) it is declared, ' That whenever any vessel the property of, or employed by, any citizen of the *United States*, or person resident therein, or any goods or effects belonging to any such citizen, or resident, shall be re-captured by any public armed vessel of the *United States*, the same shall be restored to the former owner, or owners, upon due proof, he or they paying and allowing, as and for salvage to the re-captors, one-eighth part of the value of such vessel, goods and effects, free from all deduction and expenses.'

By an act of the 2d of *March*, 1799 (4 *vol. p.* 472) it is declared, ' That for the ships or goods belonging to the citizens of the *United States*, or to the citizens, or subjects, of any nation in amity with the *United States*, if re-taken from *the enemy* within twenty-four hours, the owners are to allow one-eighth part of the whole value for salvage, &c. and if above ninety-six hours one-half, all of which is to be paid without any deduction whatsoever, &c. And, by the 9th section of the same act it is declared, ' That all the money accruing, *or which has already accrued from the sale of prizes*, shall be and remain forever a fund for the payment of the half-pay to the officers and seamen, who may be entitled to receive the same.'

The case was argued by *Lewis*, and *E. Tilghman*, for the plaintiff in error, and by *Rawle*, and *W. Tilghman*, for the defendant; and the argument turned, principally, upon two inquiries: 1st. Whether the act of *March* 1799, applied only to the event of a future general war? 2d. Whether France was *an enemy* of the *United States*, within the meaning of the law? |

p. 38 *For the plaintiff in error*, it was urged, that the acts, passed in immediate relation to France, were of a restricted, temporary, nature; but that the act of *March* 1799 established a permanent system for the government of the navy; and the designation of "the enemy" in that act, applies only to future hostilities, in case of a declared war. That on the just principles of government, every citizen has a right to the public protection; and, therefore, no salvage ought, in strictness, to be allowed for the re-capture of the property of a citizen by a public ship of war. *Vatt. b.* 2. *c.* 6. *s.* 71. And congress has manifested, in some degree, their sense on the subject, by making the salvage in that case less than in the case of re-capture by a private armed vessel. That the word ' *enemy*,' must be construed according to its legal import;

1 *Stra.* 278. and that according to legal interpretation, the differences between the *United States* and *France*, do not constitute *war*, nor render the citizens of *France enemies* of the *United States*. *Vatt. b.* 3. *s.* 69, 70. 1 *Black. Com.* 257. 2 *Black. Com.* 259. 2 *Burl.* 258. *s.* 31. 261. *s.* 39. 262. That a subsequent law does not abrogate a prior law, unless it contains contradictory matter; and where there are no negative, or repealing, words, both must be so construed as to stand together. 11 *Co.* 61. 63. *Show.* 439. 10 *Mod.* 118. 6 *Co.* 19. *b.* That the act of *March* 1799, contains no repealing, or negative, words; and may be applied, consistently, to the case of a future public war, leaving the qualified state of hostility with *France*, for the operation of the preceding law.

For the defendant in error, it was contended, that the relative situation of the *United States* and *France*, is that of 'a qualified maritime war;' on the part of the *French* aggressive; on our part, defensive; proceeding from a legitimate expression of the public will, through its constitutional organ, the congress, manifested by public declarations, and open acts. That from such a state, the character of *enemy* necessarily arises; and that the designation being so understood by congress, was intended to be applied, and was actually applied, to *France*. That the act of *March* 1799 speaks of prizes, which could only be such as had been captured from *France*; and that taking the word *prize*, according to its legal signification, it means a capture, or acquisition, by right of war, in a state of war. 3 *Bl. Com.* 69. 108. 2 *Wood.* 441. *Doug.* 585. 591. *Rob. Adm. Rep.* 283. That if a prize means a capture in war, it follows, of course, that it means a capture from an enemy; for, war can only be waged against enemies. That war may exist without a declaration; a defensive war requires no declaration; and an imperfect, or qualified, public war, is still distinct from the case of letters of marque and reprisal, for the redress of a private wrong, by the employment of a private force. 1 *Ruth. b.* 1. *c.* 19. *s.* 1. *p.* 470, 1. 2 *Ruth.* 497, 8. 503. 507. 511. *Burl.* 196. 189. *Vatt.* 475. 2 *Burl.* 204. *s.* 7. *Lee on Capt.* 13—39. *Puff.* 843. *Grot. b.* 3. *c.* 3. *s.* 6. *Molloy* 46. That congress, | by repealing the regulations respecting salvage, contained in the act of p. 39
March 1798, has virtually declared, that those regulations were in force, in relation to *France*; and that the provisions, in the act of *March* 1799, being inconsistent with the provision in the act of *June* 1798, the elder law is so far repealed.[1]

The JUDGES delivered their opinions *seriatim* in the following manner:

MOORE, *Justice*. This case depends on the construction of the act, for the regulation of the navy. It is objected, indeed, that the act

[1] All the acts of congress, passed in relation to *France*, were cited and discussed by both sides in the course of the argument; but it is thought unnecessary to refer to them more particularly in this report.

applies only to future wars; but its provisions are obviously applicable to the present situation of things, and there is nothing to prevent an immediate commencement of its operation.

It is, however, more particularly urged, that the word '*enemy*' cannot be applied to the *French*; because the section in which it is used, is confined to such a state of war, as would authorise a re-capture of property belonging to a nation *in amity* with the *United States*, and such a state of war, it is said, does not exist between *America* and *France*. A number of books have been cited to furnish a glossary on the word *enemy*; yet, our situation is so extraordinary, that I doubt whether a parallel case can be traced in the history of nations. But, if words are the representatives of ideas, let me ask, by what other word the idea of the relative situation of *America* and *France* could be communicated, than by that of *hostility*, or *war?* And how can the characters of the parties engaged in hostility or war, be otherwise described than by the denomination of *enemies?* It is for the honour and dignity of both nations, therefore, that they should be called *enemies;* for, it is by that description alone, that either could justify or excuse, the scene of bloodshed, depredation and confiscation, which has unhappily occurred; and, surely, congress could only employ the language of the act of *June* 13, 1798, towards a nation whom she considered as an enemy.

Nor does it follow, that the act of *March* 1799, is to have no operation, because all the cases in which it might operate, are not in existence at the time of passing it. During the present hostilities, it affects the case of re-captured property belonging to our own citizens, and in the event of a future war it might also be applied to the case of re-captured property belonging to a nation in amity with the *United States*. But it is further to be remarked, that all the expressions of the act may be satisfied, even at this very time: for by former laws the re-capture of property, belonging to persons resident within the *United States* is authorised; those residents may be aliens; and, if they are subjects of a nation in amity with the *United States*, they answer completely the description of the law. |

p. 40 The only remaining objection, offered on behalf of the plaintiff in error, supposes, that, because there are no repealing or negative words, the last law must be confined to future cases, in order to have a subject for the first law to regulate. But if two laws are inconsistent, (as, in my judgment, the laws in question are) the latter is a virtual repeal of the former, without any express declaration on the subject.

On these grounds, I am clearly of opinion, that the decree of the Circuit Court ought to be affirmed.

WASHINGTON, *Justice.* It is admitted, on all hands, that the defendant in error is entitled to some compensation; but the plaintiff in error

contends, that the compensation should be regulated by the act of the 28th *June* 1798, (4 *vol. p.* 154. *s.* 2.) which allows only one-eighth for salvage; while the defendant in error refers his claim to the act of the 2d *March*, (*ibid.* 456. *s.* 7.) which makes an allowance of one-half, upon a re-capture from *the enemy*, after an adverse possession of ninety-six hours.

If the defendant's claim is well founded, it follows, that the latter law must virtually have worked a repeal of the former; but this has been denied, for a variety of reasons:

1st. Because the former law relates to re-captures from *the French*, and the latter law relates to re-captures from *the enemy;* and, it is said, that *'the enemy'* is not descriptive of *France*, or of her armed vessels, according to the correct and technical understanding of the word.

The decision of this question must depend upon another; which is, whether, at the time of passing the act of congress of the 2d of *March* 1799, there subsisted a state of war between the two nations? It may, I believe, be safely laid down, that every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war. If it be declared in form, it is called *solemn*, and is of the perfect kind; because one whole nation is at war with another whole nation; and *all* the members of the nation declaring war, are authorised to commit hostilities against all the members of the other, in every place, and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition.

But hostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed *imperfect war;* because not solemn, and because those who are authorised to commit hostilities, act under special authority, and can go no farther than to the extent of their commission. Still, however, it is *public war*, because it is an external contention by force, between some of the members of the two nations, authorised by the legitimate powers. It is a war between the two nations, though all the | members are not authorised to commit hostilities such as p. 41
in a solemn war, where the government restrain the general power.

Now, if this be the true definition of war, let us see what was the situation of the *United States* in relation to *France*. In *March* 1799, congress had raised an army; stopped all intercourse with *France*; dissolved our treaty; built and equipt ships of war; and commissioned private armed ships; enjoining the former, and authorising the latter, to defend themselves against the armed ships of *France*, to attack them on the high seas, to subdue and take them as prize, and to re-capture armed vessels found in their possession. Here, then, let me ask, what

were the technical characters of an *American* and *French* armed vessel, combating on the high seas, with a view the one to subdue the other, and to make prize of his property? They certainly were not friends, because there was a contention by force; nor were they private enemies, because the contention was external, and authorised by the legitimate authority of the two governments. If they were not our enemies, I know not what constitutes an enemy.

2d. But, secondly, it is said, that a war of the imperfect kind, is more properly called acts of hostility, or reprizal, and that congress did not mean to consider the hostility subsisting between *France* and the *United States*, as constituting a state of war.

In support of this position, it has been observed, that in no law prior to *March* 1799, is *France* styled our enemy, nor are we said to be at war. This is true; but neither of these things were necessary to be done: because as to *France*, she was sufficiently described by the title of the *French* republic; and as to *America*, the degree of hostility meant to be carried on, was sufficiently described without declaring war, or declaring that we were at war. Such a declaration by congress, might have constituted a perfect state of war, which was not intended by the government.

3d. It has, likewise, been said, that the 7th section of the act of *March* 1799, embraces cases which, according to pre-existing laws, could not then take place, because no authority had been given to re-capture friendly vessels from the *French*; and this argument was strongly and forcibly pressed.

But, because every case provided for by this law was not then existing, it does not follow, that the law should not operate upon such as did exist, and upon the rest whenever they should arise. It is a permanent law, embracing a variety of subjects, not made in relation to the present war with *France* only, but in relation to any future war with her, or with any other nation. It might then very properly allow salvage for re-capturing of *American* vessels from *France*, which had previously been authorised by law, though it could not immediately apply to the vessels of friends: and whenever such a war should exist between the *United States* and *France*, or any other nation, as according
p. 42 to the law of nations, | or special authority, would justify the re-capture of friendly vessels, it might on that event, with similar propriety, apply to them; which furnishes, I think, the true construction of the act.

The opinion which I delivered at *New-York*, in *Talbot* v. *Seaman*, was, that although an *American* vessel could not justify the re-taking of a neutral vessel from the *French*, because neither the sort of war that subsisted, nor the special commission under which the *American* acted, authorised the proceeding; yet, that the 7th sect. of the act of

1799, applied to re-captures from *France as an enemy*, in all cases authorised by congress. And on both points, my opinion remains unshaken; or rather has been confirmed by the very able discussion which the subject has lately undergone in this Court, on the appeal from my decree. Another reason has been assigned by the defendant's counsel, why the former law is not to be regarded as repealed by the latter, to wit: that a subsequent affirmative general law cannot repeal a former affirmative special law, if both may stand together. This ground is not taken, because such an effect involves an indecent censure upon the legislature for passing contradictory laws, since the censure only applies where the contradiction appears in the same law; and it does not follow, that a provision which is proper at one time may not be improper at another, when circumstances are changed: but the ground of argument is, that a change ought not to be presumed. Yet, if there is sufficient evidence of such a change in the legislative will, and the two laws are in collision, we are forced to presume it.

What then is the evidence of legislative will? In fact and in law we are at war: an *American* vessel fighting with a *French* vessel, to subdue and make her prize, is fighting with an enemy accurately and technically speaking: and if this be not sufficient evidence of the legislative mind, it is explained in the same law. The sixth and the ninth sections of the act speak of *prizes*, which can only be of property taken at sea from *an enemy, jure belli;* and the 9th section speaks of prizes as taken from *an enemy*, in so many words, alluding to prizes which had been previously taken: but no prize could have been then taken except *from France*: prizes taken from *France* were, therefore, taken from *the enemy*. This then is a legislative interpretation of the word enemy; and if the enemy as to prizes, surely they preserve the same character as to re-captures. Besides, it may be fairly asked, why should the rate of salvage be different in such a war as the present, from the salvage in a war more solemn or general? And it must be recollected, that the occasion of making the law of *March* 1799, was not only to raise the salvage, but to apportion it to the hazard in which the property re-taken was placed; a circumstance for which the former salvage law had not provided.

The two laws, upon the whole, cannot be rendered consistent, unless the Court could wink so hard as not to see and know, that | in fact, in p. 43
the view of congress, and to every intent and purpose, the possession by a *French* armed vessel of an *American* vessel, was the possession of an *enemy:* and, therefore, in my opinion, the decree of the Circuit Court ought to be affirmed.

CHASE, *Justice.* The Judges agreeing unanimously in their opinion, I presumed that the sense of the Court would have been delivered by

the president; and therefore, I have not prepared a formal argument on the occasion. I find no difficulty, however, in assigning the general reasons, which induce me to concur in affirming the decree of the Circuit Court.

An *American* public vessel of war re-captures an *American* merchant vessel from a *French* privateer, after 96 hours possession, and the question is stated, what salvage ought to be allowed? There are two laws on the subject: by the first of which, only one-eighth of the value of the re-captured property is allowed; but by the second, the re-captor is entitled to a moiety. The re-capture happened after the passing of the latter law: and the whole controversy turns on the single question, whether *France* was at that time *an enemy?* If *France* was an enemy, then the law obliges us to decree one half of the value of ship and cargo for salvage: but if *France* was not an enemy, then no more than one-eighth can be allowed.

The decree of the Circuit Court (in which I presided) passed by consent; but although I never gave an opinion, I have never entertained a doubt on the subject. Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal laws.

What, then, is the nature of the contest subsisting between *America* and *France?* In my judgment, it is a limited, partial, war. Congress has not declared war in general terms; but congress has authorised hostilities on the high seas by certain persons in certain cases. There is no authority given to commit hostilities on land; to capture unarmed *French* vessels, nor even to capture *French* armed vessels lying in a *French* port; and the authority is not given, indiscriminately, to every citizen of *America*, against every citizen of *France*; but only to citizens appointed by commissions, or exposed to immediate outrage and violence. So far it is, unquestionably, a partial war; but, nevertheless, it is a public war, on account of the public authority from which it emanates.

There are four acts, authorised by our government, that are demonstrative of a state of war. A belligerent power has a right, by the law
p. 44 of nations, to search a neutral vessel; and, upon | suspicion of a violation of her neutral obligations, to seize and carry her into port for further examination. But by the acts of congress, an *American* vessel is authorised: 1st. To resist the search of a *French* public vessel: 2d. To capture any vessel that should attempt, by force, to compel submission to a search: 3d. To re-capture any *American* vessel seized by a *French* vessel; and 4th. To capture any *French* armed vessel wherever found

on the high seas. This suspension of the law of nations, this right of capture and re-capture, can only be authorised by an act of the government, which is, in itself, an act of hostility. But still it is a restrained, or limited, hostility; and there are, undoubtedly, many rights attached to a general war, which do not attach to this modification of the powers of defence and aggression. Hence, whether such shall be the denomination of the relative situation of *America* and *France*, has occasioned great controversy at the bar; and, it appears, that Sir *William Scott*, also, was embarrassed in describing it, when he observed, that 'in the present *state of hostility* (*if so it may be called*) between *America* and *France*,' it is the practice of the *English* Court of Admiralty to restore re-captured *American* property, on payment of a salvage. *Rob. Rep.* 54. *The Santa Cruz.* But, for my part, I cannot perceive the difficulty of the case. As there may be a public general war, and a public qualified war; so there may, upon correspondent principles, be a general enemy, and a partial enemy. The designation of '*enemy*' extends to a case of perfect war; but as a general designation, it surely includes the less, as well as the greater, species of warfare. If congress had chosen to declare a general war, *France* would have been a general enemy; having chosen to wage a partial war, *France* was, at the time of the capture, only a partial enemy; but still she was an enemy.

It has been urged, however, that congress did not intend the provisions of the act of *March* 1799, for the case of our subsisting qualified hostility with *France*, but for the case of a future state of general war with any nation: I think, however, that the contrary appears from the terms of the law itself, and from the subsequent repeal. In the 9th section it is said, that all the money accruing, '*or which has already accrued from the sale of prizes*,' shall constitute a fund for the half-pay of officers and seamen. Now, at the time of making this appropriation, no *prizes*, (which *ex vi termini* implies a capture in a state of war) had been taken from any nation but *France*, those which had been taken, were not taken from *France* as a friend: they must consequently have been taken from her as an enemy; and the retrospective provision of the law can only operate on such prizes. Besides, when the 13th section regulates 'the bounty given by the *United States* on any national ship of war, *taken from the enemy*, and brought into port,' it is obvious, that even if the bounty has no relation to previous captures, it must operate from the moment of passing the | act, and embraces the case of a national p. 45
ship of war taken from *France* as an enemy, according to the existing qualified state of hostilities. But the repealing act, passed on the 3d of *March* 1800, (subsequent to the re-capture in the present case) ought to silence all doubt, as to the intention of the legislature: for, if the act of *March* 1799, did not apply to the *French* republic, as an enemy,

there could be no reason for altering, or repealing, that part of it, which regulates the rate of salvage on re-captures.

The acts of congress have been analysed to show, that a war is not openly denounced against *France*, and that *France* is no where expressly called the enemy of *America*: but this only proves the circumspection and prudence of the legislature. Considering our national prepossessions in favour of the *French* republic, congress had an arduous task to perform, even in preparing for necessary defence, and just retaliation. As the temper of the people rose, however, in resentment of accumulated wrongs, the language and the measures of the government became more and more energetic and indignant; though hitherto the popular feeling may not have been *ripe* for a solemn declaration of war; and an active and powerful opposition in our public councils, has postponed, if not prevented that decisive event, which many thought would have best suited the interest, as well as the honour of the *United States*. The progress of our contest with *France*, indeed, resembles much the progress of our revolutionary contest; in which, watching the current of public sentiment, the patriots of that day proceeded, step by step, from the supplicatory language of petitions for a redress of grievances, to the bold and noble declaration of national independence.

Having, then, no hesitation in pronouncing, that a partial war exists between *America* and *France*, and that *France* was an enemy, within the meaning of the act of *March* 1799, my voice must be given for affirming the decree of the Circuit Court.

PATERSON, *Justice*. As the case appears on the record, and has been accurately stated by the counsel, and by the judges, who have delivered their opinions, it is not necessary to recapitulate the facts. My opinion shall be expressed in a few words. The *United States* and the *French* republic are in a qualified state of hostility. An imperfect war, or a war, as to certain objects, and to a certain extent, exists between the two nations; and this modified warfare is authorised by the constitutional authority of our country. It is a war *quoad hoc*. As far as congress tolerated and authorised the war on our part, so far may we proceed in hostile operations. It is a maritime war; a war at sea as to certain purposes. The national armed vessels of *France* attack and capture the national armed vessels of the *United States*; and the national armed vessels of the *United States* are expressly authorised and directed to attack, subdue, and take, the national armed vessels |
p. 46 of *France*, and also to re-capture *American* vessels. It is therefore a public war between the two nations, qualified, on our part, in the manner prescribed by the constitutional organ of our country. In such a state of things, it is scarcely necessary to add, that the term '*enemy*,' applies; it is the appropriate expression, to be limited in its signification, import,

and use, by the qualified nature and operation of the war on our part. The word enemy proceeds the full length of the war, and no farther. Besides, the intention of the legislature as to the meaning of this word, enemy, is clearly deducible from the act for the government of the navy, passed the 2d of *March* 1799. This act embraces the past, present, and future, and contains passages, which point the character of enemy at the *French*, in the most clear and irresistible manner. I shall select one paragraph, namely, that which refers to prizes taken by our public vessels, anterior to the passing of the latter act. The word prizes in this section can apply to the *French*, and the *French* only. This is decisive on the subject of legislative intention.

By the COURT: Let the decree of the Circuit Court be affirmed.

Silas Talbot v. Hans Fred. Seeman (The Amelia).

(1 Cranch, 1) 1801.

Salvage allowed to a United States ship of war, for the re-capture of a Hamburgh vessel out of the hands of the French, (France and Hamburgh being neutral to each other) on the ground that she was in danger of condemnation under the French decree of 18th January, 1798. The United States & France, in the year 1799, were in a state of partial war. To support a demand for salvage, the re-capture must be lawful, and a meritorious service must be rendered. *Probable cause* is sufficient to render the re-capture lawful. Where the amount of salvage is not regulated by positive law, it must be determined by the principles of general law. Marine ordinances of foreign countries, promulgated by the executive, by order of the legislature of the United States, may be read in the courts of the United States, without further authentication or proof. Municipal laws of foreign countries are generally to be proved as facts.

THIS was a writ of error to reverse a decree of the circuit court which reversed the decree of the district court of New-York so far as it allowed salvage to the re-captors of the ship Amelia and her cargo.

The libel in the district court was filed November 5th 1799, by captain Talbot, in behalf of himself and the other officers and crew of the United States ship of war the Constitution, against the ship Amelia, her tackle, furniture and cargo; and sets forth:

1. That in pursuance of instructions from the president of the United States he subdued, seized, &c. on the high seas, the said ship Amelia and cargo, &c. and brought her into the port of New-York.

2. That at the time of capture she was armed with eight carriage-guns and was under the command of citoyen Etienne Prevost, a French officer of marine, and had on board, besides the commander, eleven French mariners. That the libellant has been informed that she, being the property of some person to him unknown, sailed from Calcutta, an English port in the East-Indies, bound for some port in Europe; that upon her said voyage she was met with and captured by a French national corvette, called La Diligente, commanded by L. J. Dubois, who took out of her the captain and crew of the Amelia, with all the papers

relating to her and her cargo, and placed the said Etienne Prevost, and the said French mariners, on board of her, and ordered her to St. Domingo for *adjudication*, as a good and lawful prize; and that she remained in the |
p. 2 full and peaceable possession of the French, from the time of her capture, for the space of ten days, whereby, the libellant is advised, that, as well by the law of nations, as by the particular laws of France, the said ship became, and was to be considered as a French ship.

Whereupon, he prays usual process, &c. and condemnation; or, in case restoration should be decreed, that it may be on payment of such salvage as by law ought to be paid for the same.

The claim and answer of Hans Frederic Seeman in behalf of Messrs. Chapeau Rouge and Co. of Hamburgh, owners of the ship Amelia and her cargo, stated, That the said ship commanded by Jacob F. Engelbrecht, as master, sailed on the 20th of February, 1798, from Hamburgh on a voyage to the East-Indies, where she arrived safe; that in April, 1799, she left Calcutta bound to Hamburgh; that during her voyage, and at the time of her capture by the French, she and her cargo belonged to Messrs. Chapeau Rouge and Co. citizens of Hamburgh, and if restored she will be wholly their property; that on the 6th of September, on her voyage home, she was captured on the high seas by a French armed vessel commanded by citizen Dubois, who took out the master and thirteen of her crew and all her papers, leaving on board the claimant, who was mate of the Amelia, the doctor, and five other men. That the French commander put on board twelve hands and ordered her to St. Domingo, and parted from her on the 5th day after her capture. That on the 15th of September, the Amelia, while in possession of the French, was captured, without any resistance on her part, by the said ship of war, the Constitution, and brought into New-York. That the Amelia had eight carriage guns, it being usual for all vessels in the trade she was carrying on to be armed, even in times of general peace. That there being peace between France and Hamburgh at the time of the first capture, and also between the United States and Hamburgh, and between the United States and France, the possession of the Amelia by the French, in the manner, and for the time stated in the said libel, could neither by the laws of nations, nor by the laws of France, nor by those of the United States, change the property of the said ship Amelia and her cargo, or make the same liable |
p. 3 to condemnation in a French court of admiralty; that the same could not therefore be considered as French property; wherefore, he prays restoration in like plight as at the time of capture by the ship Constitution, with costs and charges.

On the 16th December, 1799, the district judge, by consent of parties, made an interlocutory decree, directing the marshal to sell the ship and cargo, and bring the money into court; and that the clerk should pay

half of the amount of sales to the claimant, on his giving security to refund in case the court should so decree; and that the clerk should retain the other half in his hands, together with all costs and charges, &c.

Afterwards, on the 25th of February, 1800, the judge of the district court made his final decree, directing half of the gross amount of sales of the ship and cargo, without any deduction whatever, to be paid to the libellant for the use of the officers and crew of the ship Constitution, to be distributed according to the act of congress for the government of the navy of the United States. And that out of the other moiety, the clerk should pay the officers of the court, and the proctors for the libellant and claimant, their taxed costs and charges, and that the residue should be paid to the owners of the Amelia or their agent.

From this decree the claimant appealed to the circuit court.

At the circuit court for the district of New-York in April, 1800, before judge Washington and the district judge, the cause was argued by B. Livingston and Burr for the appellant, and Harrison and Hamilton for the respondent; and on the 9th of April, 1800, the circuit court made the following decree, viz.

'That the decree of the district court, so far forth as it orders a payment, by the clerk, of a moiety of the gross amount of sales to Silas 'Talbot, commander, &c. and to the officers and crew of the said ship 'Constitution, is erroneous, and so far forth be reversed without costs; 'that is to say, the court, considering the admission on | the part of the p. 4
'respondent, that the papers brought here by Jacob Frederic Englebrecht, 'master of the said ship Amelia, prove her and her cargo to be Hamburgh 'property, and also considering that as the nation to which the owners of 'the said ship and cargo belong, is in amity with the French republic, 'the said ship and cargo could not, consistently with the laws of nations, 'be condemned by the French as a lawful prize, and that therefore no 'service was rendered by the United States ship of war the Constitution, 'or by the commander, officers or crew thereof, by the re-capture aforesaid.

'Whereupon it is ordered, adjudged and decreed by the court, and 'it is hereby ordered, adjudged and decreed by the authority of the same, 'that the former part of the decree of the district court, by which a moiety 'of the proceeds is allowed to the commander, officers and crew aforesaid, 'be and the same is hereby reversed.

'And the court further considering all the circumstances of the 'present case arising from the capture and re-capture stated in the libel 'and claim and answer, and that by the sale of the said ship Amelia and 'her cargo, made with the express consent of the appellant, the costs and 'charges in this cause have nearly all accrued, and that therefore the 'expenses should be defrayed out of the proceeds, Thereupon, it is 'hereby further ordered, adjudged and decreed by the court, that so

'much of the said decree of the said district court as relates to the pay-
'ment, by the clerk, to the several officers of the court, and to the proctors
'of the libellant and claimant in this cause, of their taxed costs and
'charges, out of the other moiety of the said proceeds, and also of the
'residue of the said last mentioned moiety, after deducting the costs and
'charges aforesaid, to the owner or owners of the said ship Amelia and
'her cargo, or to their legal representatives, be and the same is hereby
'affirmed.

To reverse this decree the libellant sued out a writ of error to the supreme court, and by consent of parties, the following statement of facts was annexed to the record which came up. |

p. 5 'The ship Amelia sailed from Calcutta in Bengal, in the month of
'April, 1799, loaded with a cargo of the product and manufactory of that
'country, consisting of cotton, sugars, and dry goods in bales, and was
'bound to Hamburgh.

'On the 6th of September in the same year, she was captured, while
'in the pursuit of her said voyage, by the French national corvette La
'Diligente, L. J. Dubois commander, who took out her captain and part
'of her crew, together with most of her papers, and placed a prize master
'and French sailors on board of her, ordering the prize master to conduct
'her to St. Domingo, to be judged according to the laws of war.

'On the 15th of the same month of September, the United States
'ship of war the Constitution, commanded by Silas Talbot, esquire, the
'libellant, fell in with and re-captured the Amelia, she being then in full
'possession of the French, and pursuing her course for St. Domingo
'according to the orders received from the captain of the French corvette.

'At the time of the re-capture, the Amelia had eight iron cannon
'mounted, and eight wooden guns, with which she left Calcutta, as before
'stated.

'From such of the ships papers as were found on board, and the
'testimony in the cause, the ship Amelia and her cargo appear to have
'been the property of Chapeau Rouge, a citizen of Hamburgh, residing
'and carrying on commerce in that place.

'It is conceded that the republic of France and the city of Hamburgh
'are not in a state of hostility to each other; and that Hamburgh is to be
'considered as neutral between the present belligerent powers.

'The Amelia and her cargo, having been sent by captain Talbot to
'New-York, were there libelled in the district court, and such proceedings
'were thereupon had in that court, and the circuit court for that district,
'as may appear by the writ of error and return.' |

p. 6 The cause now came on to be argued at August term, 1801, by Bayard and Ingersol for the libellant, and Dallas, Mason, and Levy for the claimant.

For the libellant three points were made.

1. That at the time, and under the circumstances, the ship Amelia was liable to capture by the law, and instructions, to seize French armed vessels, for the purpose of being brought into port, and submitted to legal adjudication in the courts of the United States.

2. That Captain Talbot, by this capture, saved the ship Amelia from condemnation in a French court of admiralty.

3. That for this service, upon abstracted principles of equity and justice, according to the law of nations, and the acts of congress, the recaptors are entitled to a compensation for salvage.

1. Had captain Talbot a right to seize the Amelia, and bring her into port for adjudication ?

The acts of congress on this subject ought all to be considered together and in one view. This is the general rule of construction where several acts are made in pari materiâ. *Plowden*, 206. 1 *Atk.* 457, 458.

The first act authorizing captures of French vessels, is that of 28th May, 1798, *Laws of United States, vol.* 4, *p.* 120. The preamble recites that ' whereas *armed vessels sailing under authority, or pretence of authority,* ' *from the republic of France,* have committed depredations on the com- ' merce of the United States,' &c. therefore, it is enacted that the president be authorized to instruct and direct the commanders of the armed vessels of the United States ' to seize, take and bring into any port of the United ' States, to be proceeded against according to the laws of nations, any ' *such* armed vessel, which shall have committed, or which shall be found ' hovering on the coasts of the United States, for the purpose of committing ' depredations on the vessels belonging to citizens thereof; and also ' to re-take any ship or vessel of | any citizen or citizens of the United p. 7 ' States, which may have been captured by any *such* armed vessel.'

The Amelia was ' an armed vessel sailing under authority from the ' republic of France,' and if she had committed, or had been found hovering on the coast for the purpose of committing depredations on the vessels of the citizens of the United States, she would have been clearly liable to capture under this act of congress. This act is entitled ' An act ' *more effectually* to protect the commerce and coasts of the United States ;' and by it the objects of capture are limited to ' armed vessels sailing ' under authority, or pretence of authority, from the republic of France, ' which shall have committed, or which shall be found hovering on the ' coasts of the United States, for the purpose of committing depredations,' &c. It was soon perceived that a right of capture, so limited, would not afford what the act contemplated, an *effectual* protection to the commerce of the United States. Congress, therefore, on the 9th July, 1798, at the same session, passed the ' act further to protect the commerce of the ' United States,' (*Laws United States, vol.* 4. *p.* 163.) and thereby took off

the restriction of the former act, which limited captures to vessels having actually committed depredation, or which were hovering on the coast for that purpose. This act authorizes the capture of any ' *armed French* ' *vessel* on the high seas,' and if the Amelia was such an armed French vessel as is contemplated by this act, she was liable to capture, and it was the duty of captain Talbot to take her and bring her into port. Another act was passed at the same session, on the 25th June, 1798, (*Laws United States, vol. 4. p.* 148.) entitled ' An act to authorize the ' defence of the merchant vessels of the United States against French ' depredations,' which, as it constitutes a part of that system of defence and opposition which the legislature had in view, ought to be taken into consideration. It enacts that merchant vessels of citizens of the United States may oppose and defend against any search, restraint or seizure which shall be attempted ' by the commander or crew of any armed vessel ' *sailing under French colours, or acting, or pretending to act, by, or under* ' *the authority of the French republic,*' and in case of attack may repel the
p. 8 same, and subdue and capture the vessel. The court | in construing any one of these laws will not confine themselves to the strict letter of that particular law, but will consider the spirit of the times, and the object and intention of the legislature. It is evident by the title of the act of July 9th, 1798, and by the general complexion of all the acts of that session upon the subject, that it was not the intention of congress, by the act of July 9th, to restrict the cases of capture contemplated by the act of 28th May, but to enlarge them. The spirit of the people was roused ; they demanded a more vigorous and a more effectual opposition to the aggressions of France, and the spirit of congress rose with that of the people. It cannot be supposed that having in *May* used the expression, ' armed vessels ' sailing under authority, or pretence of authority, from the republic of ' France,' and in *June* the expression, ' any armed vessel sailing under ' French colours, or acting, or pretending to act, by, or under the authority ' of the French republic,' they meant to restrict the cases of capture, in *July*, when they used the words ' any armed French vessel.' On the contrary, the confidence in the national opinion was increased, and further measures of defence were adopted, intending not to recede from any thing done before, but to amplify the opposition. The act of July was in addition to, not in derogation from, the act of May. Congress evidently meant the same description of vessels, in each of those acts. ' Armed vessels sailing under authority, or pretence of authority, of ' France,' and ' armed vessels sailing under French colours, or acting, or ' pretending to act under authority of the French republic,' and ' armed ' French vessels,' must be understood to be the same.

If there is a difference no reason can be given for it. A vessel, in the circumstances of the Amelia, was as capable of annoying our commerce

as if she had been owned by Frenchmen. Her force was at the command of France, and there can be no doubt but she would have captured any unarmed American that might have fallen in her way. She was, therefore, one of the objects of that hostility which congress had authorized. Congress have the power of declaring war. They may declare a general war, or a partial war. So it may be a general *maritime* war, or a partial maritime war. |

This court, in the case of Bas and Tingy, have decided that the p. 9
situation of this country with regard to France, was that of a partial and limited war. The substantial question here is, whether the case of the Amelia is a casus belli—whether she was an object of that limited war. The kind of war which existed was a war against all French force found upon the ocean, to seize it and bring it in, that it might not injure our commerce. It is precisely as if congress had authorized the capture of *all French* vessels, excepting those unarmed. If such had been the expressions, there could be no doubt of the right to capture. The object of the war being to destroy French armed force, and not French property, it made no difference in whom the absolute property of the vessel was, if her force was under the command of France. Suppose the Amelia had captured an American, by what nation would the capture be made? by Hamburgh—or by France? There can be no doubt but the injury would be attributed to France. She was under French colours, *armed*, and to every intent an object of the partial war which existed; and if so, her case is governed by the rights of war, and by the law of nations, as they exist in a state of general war.

Perhaps it may be said that this proves too much, and that if true, the Amelia must be condemned as prize.—This would be true if the rights of a third party did not interfere. Having accomplished the object of the war, as it relates to this case, in wresting from France the armed force, we must now respect the rights of a neutral nation, and restore the property to its lawful owner. But this is a subsequent consideration. It is only necessary now to shew that the capture was so far a lawful act as to be capable of supporting a claim of salvage. At first view she certainly presented the appearance of such an armed French ship as the libellant was bound in duty to seize and bring in, at least for further examination. He had *probable cause*, at least, which is sufficient to justify the seizure and detention. But if she was liable to be condemned by France, being in the hands and possession of the French, she was within the scope of the war which existed between the United States and France; she was within the meaning of the act of congress.[1] |

[1] *Bayard.*—What authority is there for American armed vessels to re-capture British vessels taken by the French?

Chase, Justice.—'Is there any case where it has been decided in our courts that 'such a re-capture was lawful?'

'It has been so decided in the English courts.'

The counsel on both sides admitted that no such case had occurred in this country.

p. 10 The act of July gives no new authority to re-capture American vessels; it only gives to private armed vessels the same right, which the act of May gives to the public armed vessels, to make captures and re-captures. But the act of May only authorizes the re-capture of American vessels, 'which may have been captured by any *such* armed vessel,' i. e. by armed vessels sailing under authority from the republic of France, and which shall have committed, or be found hovering on the coasts for the purpose of committing depredations on our commerce. Yet the instructions from the president were to re-capture *all* American vessels. These instructions shew the opinion of the executive upon the construction of the acts of congress, and for that purpose they were offered to be read.

The counsel for the claimant objected to their being read, because they were not in the record.

The counsel for the libellant contended they had a right to read them as matter of opinion, but did not offer them as matter of fact.[1] The court refused to hear them.

2. The second point is, that a service was rendered to the owners of
p. 11 the Amelia, by the re-capture, in as much | as she was thereby saved from condemnation in a French court of admiralty.

To support this position, the counsel for the libellant relied on the general system of violation of neutral rights adopted by France.

In general cases, when belligerents respect the law of nations, no salvage can be claimed for the re-capture of a neutral vessel, because no service is rendered; but rather a disservice, because the captured would, in the courts of the captors, recover damages and costs, for the illegal capture and detention.

The principle upon which the circuit court decided is not denied; but it is contended that a service was rendered by the re-capture. To shew this, the counsel for the libellant offered to read the message from

[1] *Chase, Justice.*—I am against reading the instructions, because I am against bringing the executive into court on any occasion. It has been decided, as I think, in this court, that instructions should not be read.

I think it was in a case of instructions to the collectors. It was opposed by judge Iredell, and the opposition acquiesced in by the court.

Paterson, Justice.—The instructions can only be evidence of the opinion of the executive, which is not binding upon us.

Marshall, Chief Justice.—I have no objection to hearing them, but they will have no influence on my opinion.

Moore, Justice.—Mr. Bayard can state all they contain, and they may be considered as part of his argument.

Bayard.—May I be permitted to read them as a part of my speech?

The Court.—We are willing to hear them as the opinion of Mr. Bayard, but not as the opinion of the executive.

Bayard.—I acquiesce in the opinion of the court. My reasons for wishing to read them were, because the opinion of learned men, and men of science, will always have some weight with other learned men. And the court would consider well the opinion of the executive before they would decide contrary to it.

the president to both houses of congress, of 4th May, 1798, containing the communications from our envoys extraordinary at Paris, to the department of state, and sundry arrets and decrees of the government of France, in violation of neutral rights, and of the laws of nations; and particularly the decree of the council of five hundred of 29th Nivose, an 6, (Jan. 18, 1798,) which declares, 'That the character of vessels, relative to 'their quality of neuter or enemy, shall be determined by their cargo; 'in consequence, every vessel found at sea, loaded, in whole or in part, 'with merchandize the production of England or of her possessions, shall 'be declared good prize, whoever the owner of these goods or merchandize 'may be.'

The counsel for the claimant objected to the reading of those dispatches, because they were matter of fact. No new fact can be shewn on the writ of error. Neither the pleadings, nor the statement of facts accompanying the record, give notice of introducing this new matter. By the *act of congress, vol.* 1. *p.* 60, 61, a state of the case must come up with the record; and is conclusive on this court. 3 *Dal.* 321, *Wiscart v. Dauchy. ib. p.* 327, *Ellsworth, chief justice,* said, a writ of error removes only matter of law. Arrets and decrees of foreign governments, are matters of fact, and must be proved as such, and the court can not notice them unless shewn in the | pleadings, admitted or proved. 1. P. Wms. 429, 431. *Freemoult v. Dedire,* p. 12
Douglas, 557. *Bernardi v. Motteaux.* The same case in the 2d edition, p. 575 to 579. In that case the court could not take notice of the arret of July, 1778, as it had not been given in evidence at the trial.

The general conduct of France is a matter of fact, which can only be noticed by the sovereign of the state. Judgment upon a writ of error must be upon the same facts upon which the judgment below was predicated. 3 *Bl. Com.* 405. (*Williams's edition* 407.) 8. *Term Rep.* 438, 434, 566. If it is matter of law, it is not such law as is binding upon this court, and therefore they cannot officially take notice of it. Foreign laws must be proved as facts. 3 *Woodeson* 306. 2 *Eq. ca. ab.* 289, 476. 2. *Salk.* 651. *Way v. Yally,* 6 *Mod.* 195. *same case. Cowp.* 174, 175, *Mostyn v. Fabrigas.* The law must be given in evidence. *Bos. & Pul.* 171, 175, 138. 8 *Term Rep.* 566. Facts cannot be adduced to contradict the record. 8 *Term Rep.* 438. In 2. *Rob.* 126. (*American ed.*) *the Providentia,* Dr. Scott relied on the king's instructions, but that was because the king has the power of war and peace.

A state of the case is like a special verdict; nothing new can be added to it.

In 1. *Rob.* 57, *The Santa Cruz,* Dr. Scott required the ordinances of Portugal to be proved, and evidence of the decisions of their tribunals upon them.

On the contrary, it was said by the *counsel for the libellant,* that this

case differs from evidence offered to a jury. In chancery, if evidence is not legal the chancellor will hear it, but will give it no weight. The pamphlet containing the dispatches is offered to be read, not to shew what are the municipal laws of France, but what is the law of nations in France; to shew how it has been modified by that government. We are before this court as a court of admiralty, and not as a court of common law. All the world are parties to a decree of a court of admiralty. *Bernardi v. Motteux. Doug.* 560 *or* 581. This court is now to decide by the
p. 13 law of nations, not by municipal regulations. | All the cases cited against us are cases in common law courts. But courts of admiralty take notice of foreign ordinances which affect the law of nations, without their being shewn in evidence. 1 *Rob. English ed.* 341. *American ed.* 287. *The Maria.* and 1 *Rob. English ed.* 368. *American ed.* 304. *same case.*

The object in reading these dispatches is to shew that the law of nations was not respected in France; that the construction of their courts of admiralty was such that their decisions could not conform to the law of nations; that the law of nations has been so modified in France that there was no certainty of indemnity for neutrals, and that by the decrees and arrets of that government, the Amelia would have been condemned. They are offered as the official communications of our authorized agents abroad to the executive, and by that department communicated to congress, and published in conformity to an act of congress (4. *vol. p.* 239.) for the information of the citizens of the United States. This act of congress has made them proper evidence before this court, who are therefore bound to notice them. On the subject of admitting foreign ordinances in a court of admiralty no difficulty ever occurred. The objections are only to private municipal regulations. Such, it is admitted, must be proved as facts, but not when they are offered as explaining the law of nations. In 1 *Rob. American ed.* 288. (*The Maria.*) this very decree is cited; and it is immaterial to us whether we read it out of the dispatches or out of the book which the opposite counsel have already cited for other purposes. By the same rule that they read pages 57 and 126, we may surely read page 288.

On the part of the claimant it was replied,

That this decree is not an act of congress, nor the law of nations, but simply a law of France. The record is confined to the facts which originally came up with the writ of error, or such as may afterwards be procured upon a suggestion of diminution. It is admitted that in equity, on an appeal to the house of lords, nothing new can be received. And nothing ought now to be read which was not before the circuit court, or
p. 14 which that | court was bound to notice. In the cases cited by the opposite counsel the arrets were read by consent. A common law court is as much bound as a court of admiralty to take notice of the law of nations,

on a question where that law applies ; and the rules by which common law courts are bound, as to evidence of the law of nations, are equally binding on courts of admiralty.

The court suffered the dispatches, and decrees of France, to be read, but reserved the question, whether they ought to be considered in their decision of this cause, until the whole argument of the case should be finished.

The counsel for the libellant proceeded in the argument on the 2d point.

The decree of 18th of January, 1798, was not repealed till the 14th of December, 1799, and consequently was in full force at the time of the capture on the 6th of September, 1799. The facts stated in the appendix to 2d vol. of Robertson's reports, shew that the French had discarded the law of nations, and that their conduct towards neutrals had been such as to exclude every possibility of escape. So notorious was this conduct that sir William Scott makes it the ground of his decision in various cases.

It is not necessary to shew that the Amelia would certainly have been condemned. To entitle to salvage it is only necessary to shew that she was in a better condition by the re-capture. Her cargo was the production of the possessions of England, and therefore by the decree of 18th January, 1798, was liable to condemnation. The general conduct of France and of the French courts of admiralty towards neutrals has been repeatedly adjudged by Sir William Scott a good ground for salvage. 1 *Rob.* 232. (*The Two Friends*) 2 *Rob.* 246. (*The War Onskan.*)

3dly. But without resorting to the general principle of a service being a ground for salvage, we claim it under the express terms of the act of congress of the 2d of March, 1799, entitled ' an act for the government of ' the navy of the United States,' § 7. vol. 4. p. 472. by | which it is enacted p. 15
' that for the ships or goods belonging to the citizens of the United States, ' or to the citizens or subjects of any nation in amity with the United ' States, if re-taken from the *enemy* within twenty-four hours, the owners ' are to allow one-eighth part of the whole value for salvage, &c. and if ' after ninety-six hours, one half ; all of which is to be paid without any ' deduction whatsoever.'

In the case of *Bas and Tingy* it was decided by this court that France was to be considered as an enemy. The case of the Amelia comes within the very words of this act of congress. She is a ship belonging to citizens of a nation in amity with the United States, re-taken from the enemy after a possession of ninety-six hours.

By the *act of congress of 25th June*, 1798, *vol. 4. p.* 149, 150. property of American citizens, re-captured by armed merchant vessels, is to be restored on the payment of not less than one-eighth, and not more than one-half for salvage. And by *the act of 3d March*, 1800, not less than one-sixth is allowed on re-capture by a private armed vessel, and one-eighth by a public ship of war.

If then the re-capture of this vessel was a lawful act, and if service was rendered thereby to the owners, the re-captors are entitled to salvage, and the rate of that salvage is by the act of congress fixed at one-half of the value of the ship and cargo.

On the part of the claimant it was said, that if France and America were at peace, the re-capture was not authorized by the law of nations. The claim of salvage must rest on two grounds.

1. A right to interfere.

2. A benefit conferred on the owners.

1. It is admitted that a belligerent has a right to detain a neutral vessel and carry her into port for the purpose of examination. The possession of a belligerent must, by third parties, be considered as lawful, whatever may be the motive or intent of such possession. 2 *Woodeson* |
p. 16 424. The belligerent has a lawful right to search merchant vessels, and this right cannot be considered as injurious to the fair neutral trader. Resistance to such search is unlawful, and such resistance, a rescue, or an escape, are sufficient causes to condemn the neutral vessel. *Vattel. B.* 3. *c.* 7. § 114. *p.* 507. 1 *Rob.* 304. (*The Maria.*)

The act of the re-captor's, then being in aid of the unlawful resistance of the neutral, must in itself be illegal. The courts of the captors only are competent to decide the question of prize or no prize. American citizens have no right to interfere, and wrest the neutral vessel from the possession of the belligerent.

The French have been represented as pirates, *hostes humani generis*. But if France has waged so general a war on neutral property, has not England done the same ?

We find in *their* courts, that when a benefit is to accrue to British subjects, by such a decision, they decide that France must be presumed to respect the law of nations, and to decree restitution ; 1 *Rob.* 84, 85. (*The Betsey.*) 7 *Term Rep.* 695. *Geyer v. Aguilar* ; but when salvage is to be given to British re-captors of neutral property, then it appears that France has lost all regard for the law of nations, and there is no chance of escape from her courts of admiralty. 1 *Rob.* 232. (*The Two Friends.*) 2 *Rob.* 246. (*The War Onskan.*).

But it is contended that the courts of France would have decided according to the decree of 18th January, 1798, and not according to the law of nations. This is not to be presumed ; but if it was, however tyrannical the conduct of a belligerent may be, no neutral can lawfully interfere, unless she herself is injured, or her property or rights are affected ; and even then individuals cannot act. The injury must be redressed by the government in the way of negociation or war. What was the conduct of our government in such a case ? It first chose to negociate, and then to prepare for war. At the time the negociation was begun, all

the injurious decrees were in force, full in the view of the legislature, who authorized certain measures of hostility: but no citizen could | go one p. 17
step beyond what was authorized. The liability of the Amelia to condemnation in a French court of admiralty, created no right in captain Talbot to capture her, even if that condemnation was certain. But the facts of this case do not warrant such a conclusion. The fact stated is that 'the ship Amelia sailed from *Calcutta in Bengal* in the month of 'April, 1799, loaded with a cargo of the product and manufactory of *that* '*country*.' What country? *Bengal;* but Bengal is not stated to be one of the possessions of England. Not long since the province of Bengal was in possession of sovereign princes; but it does not appear how far they have been subdued by the English. It is true that the libel speaks of Calcutta as being an English port in the East-Indies, but it does not follow that the whole country of Bengal has been subjected to the British power. Besides it is not the port from whence the vessel sails which taints the cargo, but its quality, as being the production of an English possession. Hence it does not appear that the Amelia was liable to condemnation under the decree of 18th January, 1798, and we cannot presume that she would have been condemned. The French captors did not pretend she was liable under that decree, but sent her in to be judged according to the laws of war; that is, according to the law of nations as applicable to a state of war; and there being no fact stated to the contrary, we are to suppose that she would have been so judged, and not otherwise. To have interfered on our part to prevent this would have been a just cause of hostilities against us. No citizen ought to be allowed to come into our courts to claim a reward for an act which hazards the peace of the country.

If benefit be the criterion of salvage, then the greater the service, the greater ought to be the salvage. But if the construction, given by the opposite counsel, to the act of 2d March, 1799, be correct, then the same salvage is due for the re-capture of a clear neutral, as of a belligerent. And yet in common wars no salvage at all is due for the re-capture of a neutral.

Every neutral nation has a right to choose her own manner of redress. We have no right to interfere, or to decide how far her vessels are liable to condemnation under French decrees. She may be willing to trust to the | chances of acquittal or indemnification. We have no right to legislate p. 18
upon the property of a foreign independent nation, and to say that we will, whether you consent or not, rescue your vessels from the French, and then make you pay us salvage. *Vattel. B. 2. ch.* 1. § 7. *p.* 123. If an act, intended solely for my benefit, is advantageous to another, I am not entitled to reward. 2 *Rob.* 23, 24. (*The Vryheid.*) In order to ground a claim of salvage, the danger of the property must have been not hypothetical, but absolute; not distant and uncertain, but immediate and

imminent: the act of saving must have been done with that sole intent, and must have been attended with labour, loss, expense or hazard to the salvor. The Amelia was taken by captain Talbot, and libelled as a *French* vessel; his object was not to save a neutral, but to capture a belligerent. Under such a mistake he might have a right to examine her further, but the moment she proved to be neutral property he ought to have released her. His mistake can be no ground for a claim of salvage. It is a mere justification of an act of force, and as such may save him from the payment of damages and costs. In this case there was no danger to the property, no trouble in saving it, nor any intention to benefit the owners. In *Beawes Lex. mer. vol.* 1. *p.* 158, it is said that to support a claim of salvage, the vessel must be in evident hazard, and must be saved by means used with that sole view.

The owner was a citizen of an independent nation, and ought to have had his election. Where is the law or the authority that allows salvage to one belligerent taking from another the property of a neutral? By the state of the case this vessel was neutral as to all the belligerent powers. If the captor had applied for her, she must have been given up, upon the authority of the case of *Glass and Gibbs*, 3 *Dal.* 6. without any compensation for re-capture. Among the cases cited, the only one against us is 2 *Rob.* 246. (*The War Onskan.*) In that case sir William Scott says, that '*lately*' it has been the practice of his court to give salvage on re-capture of neutral property out of the *hands of the French*; but that such is not the modern practice of the law of nations; and upon this plain principle, that the liberation of a clear neutral from the hand of the enemy, is no essential service rendered to him; in as much as that same enemy
p. 19 would be | compelled by the tribunals of his own country, after he had carried the neutral into port, to release him with costs and damages for the injurious seizure and detention. But in that very case, however, we see that he might shortly change his course of decisions on that subject, so that very probably, had that case been decided in the next term, it would have been decided differently. No judge has a right to decide upon the departure of other nations from the law of nations, whatever evidence of such departure he may possess. There will be a variance in the decisions of the lower courts; it should, therefore, be put upon such a footing as to make it clear and plain to all the judges of the inferior courts. This decision of sir William Scott is a creature of his own, which he himself promises to change when the situation of affairs will allow.

Sir William Scott gives salvage expressly on the ground of service rendered, on account of the kind of hostility which France exercised towards neutrals. But in this case the statement of facts excludes the idea of hostility between France and Hamburgh. The law of nations gave no right to re-capture. The authority under the acts of congress

must be construed strictly, and confined to their express provisions. Neither the executive, nor individuals, nor the courts have a right to alter them.

So far as war is not authorized by congress there is peace. It was not contemplated by any act of congress that our vessels should capture Hamburgh vessels. The mischief to be remedied by the act of May was that the small armed vessels of France were hovering on our coasts and taking our vessels almost in our ports. The act of congress has completely met the evil, by authorizing the capture of such French vessels as had taken, or were found hovering for the purpose of taking our vessels. This act, therefore, does not authorize the capture of a Hamburgh vessel. There is no law which authorizes a capture for two purposes, viz. to be condemned as a French vessel or to be subjected to salvage as a neutral. The Amelia was not navigating under the authority, or pretended authority of France. She was engaged in a lawful trade. But if the French took possession of her under suspicion of unlawful trade, that gave us no authority | to take her from the possession of France, the property, under p. 20
the law of nations, not being changed. The taking being unlawful can support no claim of salvage.

The act of July, 1798, authorizes only the capture of armed French vessels, and confines the cases of re-capture to the ships or goods of citizens or *residents* of the United States. The capture can only be justified by the doubtful character of the vessel, and as soon as that was known to be neutral, capt. Talbot ought to have dismissed her; the detention afterwards was unlawful and will not justify a decree for salvage. This vessel, it is true, might have been used to distress our commerce, and this might possibly be an excuse for detaining her, or even dismantling her, but will not entitle him to salvage.

If this vessel was lawful prize to France, then France has a claim for indemnity; but as she has made no claim we must presume the vessel would have been restored by her to the owners.

The act of congress of *March* 2, 1799, upon which the counsel for the libellant rely, does not contemplate a case like the present. That is a permanent law, not made for the present war only, but intended to apply to all future wars. It could not therefore intend to give salvage on the recapture of a neutral from a belligerent, which is not given by the law of nations, and which, it is allowed on all hands, is given this war, for the first time, only on account of the conduct of France towards neutrals, and will cease when that conduct shall be altered. Besides, it would give the same reward for taking the property of a neutral out of the hand of his friend, as out of the hand of his enemy. The word 'enemy' in the 7th section of that act, means the enemy of us and our ally whose vessel is re-captured by our armed vessels—and not *our* enemy

who is the friend of our ally. If then this is not a statutory case of salvage, we must recur to the question of benefit. In the court below they relied wholly on the act of congress. Not a word was said respecting the service rendered. Let us then consider the claim of *quantum meruit*. To support this, there must be, |

p. 21 1. A lawful consideration, and

2. A contract express or implied.

To make the consideration lawful, it must be permitted by law; *a fortiori* it must not be contrary to law.

It is not authorized by our law to take the property of a neutral out of the possession of his friend, and it is in direct opposition to policy, as it tends to commit the peace of the country.

It is not alledged that there was any express contract; and a contract cannot be implied, because the intent with which she was taken, viz. to be condemned as a French armed vessel, excludes the idea. Nor can an implied contract be raised on the retaining her, because that was a state of duress, which cannot be made the ground of a reward.

But if this case is to be considered upon a quantum meruit, then the amount of salvage must depend upon the danger and the exertion. 1. *Rob.* 151. (*The St. Bernardo,*) and 1 *Rob.* 240. (*The Two Friends.*) It is said that in cases of unauthorized capture or re-capture, the property goes to the crown; 2. *Rob.* 45. (*The Princessa,*) and it is sometimes referred to the court to fix the reward of the captors. It follows then that the property goes to the government, and they alone can fix the reward. But our code gives no right to salvage in this case, nor does the state of hostilities between the two countries, as disclosed on the record, justify it. But if the decree, and the notoriety of the misconduct of France, are to be admitted to prove a benefit conferred, who can say it was worth 94,000 dollars; the half of the gross amount of sales of the ship and cargo? Neither the service rendered, the danger to the property, nor the exertion in saving it, can justify so enormous a reward.

The decree of France might be only *in terrorem*, and so no danger. If the Amelia was not liable to condemnation in the French courts, then no service was rendered, and consequently no salvage ought to be allowed. |

p. 22 But if she was liable to condemnation, then the re-capture is a violation of the rights of France.

If France violates the laws of nations, it is no justification of a violation of them on our part. An illegal power to take, given by France to her cruizers, does not authorize us to re-take.

In the case of *Bas* v. *Tingy, Feb. term*, 1800, *in the supreme court of the United States*, the reasoning of the court seems to admit that the act of 2d March, 1799, will not apply, in the present state of hostilities, to re-captures of the vessels of nations in amity with the United States,

unless the owners are residents of the United States ; because there could be no lawful re-capture of a neutral from the hand of a belligerent.

Judge Moore, in delivering his opinion in that case says, ' It is however ' more particularly urged, that the word " *enemy* " can not be applied to ' the French ; because the section, in which it is used, is confined to such ' a state of war, as would authorize a re-capture of property belonging ' to a nation in *amity* with the United States, and *such a state of war does* ' *not exist between America and France.* A number of books have been ' cited to furnish a glossary on the word *enemy* ; yet, our situation is so ' extraordinary, that I doubt whether a parallel case can be traced in the ' history of nations. But if words are the representatives of ideas, let ' me ask by what other word the idea of the relative situation of America ' and France could be communicated, than by that of *hostility* or *war* ? ' And how can the characters of the parties engaged in hostility or war, ' be otherwise described than by the denomination of " *enemies.*" It is ' for the honor and dignity of both nations, therefore, that they should ' be called enemies ; for it is by that description alone, that either could ' justify or excuse, the scene of bloodshed, depredation and confiscation, ' which has unhappily occurred ; and, surely, congress could only employ ' the language of the act of June 13, 1798, towards a nation whom she ' considered as an enemy.'

' Nor does it follow that the act of March, 1799, is to have no opera- ' tion, because all the cases in which it | might operate, *are not in existence* p. 23 ' at the time of passing it. During the present hostilities, it affects the ' case of re-captured property belonging to *our own citizens*, and in the ' event of a *future war* it might also be applied to the case of re-captured ' property belonging to a *nation in amity with the United States.*

And in the same case, Judge Washington observed, ' that hostilities ' may subsist between two nations, more confined in its nature and ' extent ; being limited as to places, persons and things ; and this is ' more properly termed *imperfect* war ; because not *solemn, and because* ' *those who are authorized to commit hostilities, act under special authority,* ' *and can go no further than to the extent of their commission.*' And again he says, ' It has likewise been said that the 7th section of the act of ' March, 1799, embraces cases which according to pre-existing laws, ' could not then take place, because no authority had been given to ' re-capture friendly vessels from the French, and this argument was ' strongly and forcibly pressed.

' But because every case provided for by this law *was not then existing*, ' it does not follow that the law should not operate upon such as did exist, ' *and upon the rest whenever they should arise.* It is a permanent law em- ' bracing a variety of subjects ; not made in relation to the present war ' with France only, but in relation to any future war with her, or with

'any other nation. It might then very properly allow salvage for re-
'capturing of *American* vessels from France, which had previously been
'authorized by law, though it could not *immediately* apply to the vessels
'of *friends*; and whenever such a war should exist between the United
'States and France, or any other nation, as, according to the law of
'nations, or special authority, would *justify the re-capture of friendly*
'*vessels*, it *might on that event*, with similar propriety, apply to them;
'which furnishes, I think, the true construction of the act.'

'The opinion which I delivered at New-York, in *Talbot v. Seeman*,
'was, that although an American vessel could not justify the taking of
'a neutral vessel from the French, because neither the sort of war that |
p. 24 'subsisted, nor the special commission under which the American acted,
'authorized the proceeding; yet that the 7th section of the act of 1799,
'applied to re-captures from France, *as an enemy, in all cases authorized*
'*by congress*. And on both points my opinion remains unshaken; or
'rather has been confirmed by the very able discussion which the subject
'has lately undergone in this court, on the appeal from my decree.'[1]

Similar sentiments were also expressed by Judge Chase and Judge Paterson in the same case. From these opinions it seems clearly to result that the act of March 2d 1799, can not be the rule of salvage in this case.

On the part of the libellant it was stated in reply, as to the admissibility of the dispatches from the American envoys, and the French arret of 18th January, 1798, that courts of admiralty will always take notice of such laws of foreign countries as go to modify or change the law of nations, and are not bound by the same rules of evidence, as courts of common law. 1. *Dal.* 364. *Loft.* 631. *Doug.* 619. 622. 649. 650. 554. The opposite counsel have cited and relied on Robinson's reports to shew what was the ancient law of France, and surely we have as good a right to cite the same book to shew what is the present law of France. In 1 *Rob.* 288. (*The Maria,*) this arret of France is cited and argued upon by the judge.

The cases cited by the opposite counsel to shew that foreign laws must be proved as facts, are all cases at common law, or relate to the mere municipal laws of a foreign country; and are not such as go to modify or explain the law of nations, as that country has adopted it.

The case in P. Williams refers to a municipal law which had no connection with the law of nations. The same observation applies to the cases from 6 *Mod. and* 2 *Salk.* No case can be produced where a law of a foreign country, authenticated as this is, by an act of the legislature of our country, has been refused to be considered by a court. |

p. 25 As to the objection that the cargo does not appear to be the production of England or her possessions, because there is no evidence that the whole

[1] This case of Talbot v. Seeman, was argued once before, in this court, at Philadelphia.

of the province of Bengal has been subjected to the dominion of England ; it may be sufficient to observe, that the libel and answer admit Calcutta to be an English port, and the case stated says, the vessel sailed from Calcutta in Bengal, loaded with a cargo of the product and manufactory of *that country*. It being admitted that Calcutta is an English port, and that the cargo was the production of that country, it follows, unless the contrary is clearly shewn in evidence, that the cargo was the product of an English possession.

It is said that there is no evidence that France carried her unjust decrees into execution, and that they might only be enacted *in terrorem*. But the fact is notorious to all the world. Congress have expressly declared it in the preambles of their acts. The whole system of hostility is founded upon it, and can be justified on no other ground. They have further declared it by ordering the dispatches to be published and distributed among the citizens of the United States, for their information. It would be strange if this court sitting here as a court of the law of nations to try a cause in which all the world are parties, should be the only persons in the world ignorant of the fact.

The general principle is admitted that salvage is not due for the re-capture of a neutral from a belligerent, and for this reason that by the law of nations the neutral would be restored by the captor with damages and costs. But *cessante ratione, cessat lex*. And it follows by powerful inference that if the captor would not have restored the neutral with damages and costs, salvage ought to be allowed. To bring the Amelia within this inference, it is only necessary to shew that she would not have been restored with damages and costs. If the court should take into consideration the arret of 18th January, 1798, and the fact that the cargo was the production of an English possession, there is no doubt but, instead of being restored with damages and costs, she would have been condemned and totally lost to the owners. Is no salvage due for so certain and so signal a benefit ? |

It is said that unless salvage is expressly given by the act of congress, p. 26
it can only be claimed upon a contract, either express, or implied. This is not the case. The claim of salvage upon re-capture never is supposed to arise *ex contractu*. It is given as a reward for the benefit received, and where there is no express statute upon the subject, the amount is to be regulated, not by the labour or hazard of the re-captor, nor by his intention to confer a benefit, but by the supposed amount which the owner would have been willing to give for the rescue of his property. *Woodeson*, 423. In 1 *Rob.* 234. 235. (*The Two Friends,*) the rule of salvage on rescue is said to be *quantum meruit*. And in the same case, *p.* 232, sir W. Scott says, ' It has been slightly questioned in the act of court (which contains the ' exposition of facts given by both parties) whether there was such a state

' of hostilities between America and France as to raise a title of salvage ' for American goods retaken from the French. But this point has not ' been pursued in argument ; and indeed I should wonder if it had, after ' the determinations of this court, which have in various instances, decreed ' salvage in similar cases. It is not for me to say whether America is at ' war with France, or not ; but the conduct of France towards America ' has been such *de facto*, as to induce American owners to acknowledge ' the services by which they have recovered their ships and cargoes out ' of the hands of French cruizers by force of arms.'

In the case of *Bas & Tingy*, the question was not argued, whether salvage could be claimed upon the re-capture of a neutral, on the ground of benefit rendered ; and therefore the opinion of the court in that case does not militate with our claim.

August 11th. *Marshall, Chief Justice*, delivered the opinion of the court.

This is a writ of error to a decree of the circuit court for the district of New-York, by which the decree of the district court of that state, restoring the ship Amelia to her owner on the payment of one-half for salvage, was reversed, and a decree rendered, directing the restoration of the vessel without salvage. |

p. 27 The facts agreed by the parties, and the pleadings in the cause, present the following case :

The ship Amelia sailed from Calcutta in Bengal, in April, 1799, loaded with a cargo of the product and manufactory of that country, and was bound to Hamburgh. On the 6th September she was captured by the French national corvette La Diligente, commanded by L. J. Dubois, who took out the captain, part of the crew, and most of the papers of the Amelia, and putting a prize master and French sailors on board her, ordered her to St. Domingo to be judged according to the laws of war.

On the 15th of September she was re-captured by captain Talbot, commander of the Constitution, who ordered her into New-York for adjudication.

At the time of the re-capture, the Amelia had eight iron cannon, and eight wooden guns, with which she left Calcutta. From the ships papers, and other testimony, it appeared that she was the property of Chapeau Rouge, a citizen and merchant of Hamburgh ; and it was conceded by the council below, that France and Hamburgh were not in a state of hostility with each other, and that Hamburgh was to be considered as neutral between the present belligerent powers.

The district court of New-York, before whom the cause first came, decreed one-half of the gross amount of the ship and cargo as salvage to the re-captors. The circuit court of New-York reversed this decree, from which reversal, the re-captors appealed to this court.

The Amelia was libelled as a French vessel, and the libellant prays that she may be condemned as prize; or, if restored to any person entitled to her as the former owner, that such restoration should be made on paying salvage. The claim and answer of Hans Frederick Seeman, discloses the neutral character of the vessel, and claims her on behalf of the owners.

The questions growing out of these facts, and to be decided by the court, are— |

Is captain Talbot, the plaintiff in error, entitled to any, and if to any, p. 28
to what salvage in the case which has been stated?

Salvage is a compensation for actual service rendered to the property charged with it.

It is demandable of right for vessels saved from pirates, or from the enemy.

In order, however, to support the demand, two circumstances must concur.

1st. The taking must be lawful.

2d. There must be a meritorious service rendered to the re-captured.

1st. The taking must be lawful—for no claim can be maintained in a court of justice, founded on an act in itself tortious. On a re-capture, therefore, made by a neutral power, no claim for salvage can arise, because the act of re-taking is a hostile act, not justified by the situation of the nation to which the vessel making the re-capture belongs, in relation to that from the possession of which such re-captured vessel was taken. The degree of service rendered the rescued vessel is precisely the same as if it had been rendered by a belligerent; yet the rights accruing to the re-captor are not the same, because no right can accrue from an act in itself unlawful.

In order then to decide on the right of captain Talbot it becomes necessary to examine the relative situation of the United States and France at the date of the re-capture.

The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry. It is not denied, nor in the course of the argument has it been denied, that congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed. |

To determine the real situation of America in regard to France, the p. 29
acts of congress are to be inspected.

The first act on this subject passed on the 28th of May, 1798, and is entitled 'An act more effectually to protect the commerce and coasts of the United States.'

This act authorizes any armed vessel of the United States to capture any armed vessel sailing under the authority, or pretence of authority, of the republic of France, which shall have committed depredations on vessels belonging to the citizens of the United States, or which shall be found hovering on the coasts for the purpose of committing such depredations. It also authorizes the re-capture of vessels belonging to the citizens of the United States.

On the 25th of June, 1798, an act was passed ' to authorize the defence of the merchant vessels of the United States against French depredations.'

This act empowers merchant vessels, owned wholly by citizens of the United States, to defend themselves against any attack which may be made on them by the commander or crew of any armed vessel sailing under French colours, or acting, or pretending to act, by or under the authority of the French republic ; and to capture any such vessel. This act also authorizes the re-capture of merchant vessels belonging to the citizens of the United States. By the 2d section, such armed vessel is to be brought in and condemned for the use of the owners and captors.

By the same section, re-captured vessels belonging to the citizens of the United States, are to be restored, they paying for salvage not less than one-eighth nor more than one-half of the true value of such vessel and cargo.

On the 28th of June, an act passed ' in addition to the act more effectually to protect the commerce and coasts of the United States.'

This authorizes the condemnation of vessels brought in under the first act, with their cargoes, excepting only from such condemnation the
p. 30 goods of any citizen or person resident | within the United States, which shall have been before taken by the crew of such captured vessel.

The second section provides that whenever any vessel or goods the property of any citizen of the United States or person resident therein, shall be re-captured, the same shall be restored, he paying for salvage one-eighth part of the value, free from all deductions.

On the 9th of July another law was enacted, ' further to protect the commerce of the United States.'

This act authorizes the public armed vessels of the United States to take any armed French vessel found on the high seas. It also directs such armed vessel, with her apparel, guns, &c. and the goods and effects found on board, being French property, to be condemned as forfeited.

The same power of capture is extended to private armed vessels.

The 6th section provides, that the vessel or goods of any citizen of the United States, or person residing therein, shall be restored, on paying for salvage not less than one eighth, nor more than one half, of the value of such re-capture, without any deduction.

The 7th section of the act for the government of the navy, passed the

2d of March, 1799, enacts, 'That for the ships or goods belonging to the citizens of the United States, or to the citizens or subjects of any nation in amity with the United States, if re-taken within twenty-four hours, the owners are to allow one eighth part of the whole value for salvage,' and if they have remained above ninety-six hours in possession of the enemy, one half is to be allowed.

On the 3d of March 1800, congress passed 'an act providing for salvage in cases of re-capture.'

This law regulates the salvage to be paid 'when any vessels or goods, which shall be taken as prize as aforesaid, shall appear to have before belonged to any person or | persons permanently resident within the p. 31
territory and under the protection of any foreign prince, government or state, in amity with the United States, and to have been taken by an enemy of the United States, or by authority, or pretence of authority from any prince, government, or state, against which the United States have authorised, or shall authorise defence or reprisals.'

These are the laws of the United States, which define their situation in regard to France, and which regulate salvage to accrue on re-captures made in consequence of that situation.

A neutral armed vessel which has been captured, and which is commanded and manned by Frenchmen, whether found cruizing on the high seas, or sailing directly for a French port, does not come within the description of those which the laws authorise an American ship of war to capture, unless she be considered quoad hoc as a French vessel.

Very little doubt can be entertained but that a vessel thus circumstanced, encountering an American unarmed merchantman, or one which should be armed, but of inferior force, would as readily capture such merchantman as if she had sailed immediately from the ports of France. One direct and declared object of the war then, which was the protection of the American commerce, would as certainly require the capture of such a vessel as of others more determinately specified. But the rights of a neutral vessel, which the government of the United States cannot be considered as having disregarded, here intervene; and the vessel certainly is not, correctly speaking, a French vessel.

If the Amelia was not, on the 15th September 1799, a French vessel within the description of the act of congress, could her capture be lawful?

It is, I believe, a universal principle, which applies to those engaged in a partial, as well as those engaged in a general war, that where there is probable cause to believe thd vessel met with at sea, is in the condition of one | liable to capture, it is lawful to take her, and subject her to the p. 32
examination and adjudication of the courts.

The Amelia was an armed vessel commanded and manned by Frenchmen. It does not appear that there was evidence on board to ascertain

her character. It is not then to be questioned, but that there was probable cause to bring her in for adjudication.

The re-capture then was lawful.

But it has been insisted that this re-capture was only lawful in consequence of the doubtful character of the Amelia, and that no right of salvage can accrue from an act which was founded in mistake, and which is only justified by the difficulty of avoiding error, arising from the doubtful circumstances of the case.

The opinion of the court is, that had the character of the Amelia been completely ascertained by capt. Talbot, yet as she was an armed vessel under French authority, and in a condition to annoy the American commerce, it was his duty to render her incapable of mischief.—To have taken out the arms or the crew, was as little authorized by the construction of the act of congress contended for by the claimants, as to have taken possession of the vessel herself.

It has, I believe, been practised in the course of the present war, and if not, is certainly very practicable, to man a prize and cruize with her for a considerable time without sending her in for condemnation. The property of such vessel would not, strictly speaking, be changed so as to become a French vessel, and yet it would probably have been a great departure from the real intent of congress, to have permitted such vessel to cruise unmolested. An armed ship under these circumstances might have attacked one of the public vessels of the United States. The acts which have been recited expressly authorise the capture of such vessel so commencing hostilities, by a private armed ship, but not by one belonging to the public. To suppose that a capture would in one case be lawful, and in the other unlawful; or to suppose that even in the
p. 33 limited state of hostilities in which we were placed, two | vessels armed and manned by the enemy, and equally cruizing on American commerce, might the one be lawfully captured, while the other, though an actual assailant, could not, or if captured, that the act could only be justified from the probable cause of capture furnished by appearances; would be to attribute a capriciousness to our legislation on the subject of war, which can only be proper when inevitable.

There must then be incidents growing out of those acts of hostility specifically authorised, which a fair construction of the acts will authorise likewise.

This was obviously the sense of congress.

If by the laws of congress on this subject, that body shall appear to have legislated upon a perfect conviction that the state of war in which this country was placed, was such as to authorize re-captures generally from the enemy; if one part of the system shall be manifestly founded on this construction of the other part, it would have considerable weight in rendering certain what might before have been doubtful.

Upon a critical investigation of the acts of congress it will appear, that the right of re-capture is expressly given in no single instance, but that of a vessel or goods belonging to a citizen of the United States.

It will also appear that the quantum of salvage is regulated, as if the right to it existed previous to the regulation.

Although no right of re-capture is given in terms for the vessels and goods belonging to persons residing within the United States not being citizens, yet an act, passed so early as the 28th of June 1798, declares, that vessels and goods of this description, when re-captured, shall be restored on paying salvage; thereby plainly indicating that such re-capture was sufficiently warranted by law to be the foundation of a claim for salvage.

If the re-capture of vessels of one description, not expressly authorized by the very terms of the act of congress | be yet a rightful act, recognized p. 34
by congress as the foundation for a claim to salvage, which claim congress proceeds to regulate, then it would seem that other re-captures from the same enemy are equally rightful; and where the claim they afford for salvage has not been regulated by congress, such claim must be determined by the principles of general law.

In this situation remained the re-captured vessels of any other power also at war with France, until the act of the 2d of March, 1799, which regulates the salvage demandable from them. Neither by that act, nor by any previous act, was a power given in terms, to re-capture such vessels. But their re-capture was an incident which unavoidably grew out of the state of the war. On the capture of a French vessel, having with her as a prize, the vessel of such a power, the prize was inevitably re-captured. On the idea that the re-capture was lawful and that it was a foundation on which the right to salvage could stand, the legislature in March 1799, declare what the amount of that salvage should be.

The expression of this act is by no means explicit. If it extends to neutrals then it governs in this case; if otherwise, the law respecting them continued still longer on the same ground with the law respecting a belligerent, prior to the passage of the act of the 2d of March, 1799. Thus it continued until the 3d of March 1800, when the legislature regulated the salvage to be paid by neutrals, re-captured from a power against which the United States have authorized defence or reprisals.

This act having passed subsequent to the re-capture of the Amelia, can certainly not affect that case as to the quantity of salvage, or give a right to salvage which did not exist before. But it manifests, in like manner with the laws already commented on, the system which congress considered itself as having established. This act was passed at a time when no additional hostility against France could have been contemplated. It was only designed to keep up the defensive system which had before

been formed, and which it was deemed necessary to continue, till the negotiation then pending should have a pacific termination. Accordingly
p. 35 there is no expression in the act | extending the power of re-capture, or giving it in the case of neutrals. This power is supposed to exist as an incident growing out of the state of war, and the right to salvage produced by that power is regulated in the act.

In case of a re-capture subsequent to the act, no doubt could be entertained, but that salvage, according to its terms, would be demandable. Yet there is not a syllable in it which would warrant an idea that the right of re-capture was extended by it, or did not exist before.

It must then have existed from the passage of the laws, which commenced a general resistance to the aggressions we had so long experienced and submitted to.

It is not unworthy of notice that the first regulation of the right of salvage in the case of a re-capture, not expressly enumerated among the specified acts of hostility warranted by the law, is to be found in one of those acts which constitute a part of the very system of defence determined on by congress, and is the first which subjects to condemnation the prizes made by our public ships of war.

It has not escaped the consideration of the court that a legislative act, founded on a mistaken opinion of what was law, does not change the actual state of the law as to pre-existing cases.

This principle is not shaken by the opinion now given. The court goes no further than to use the provisions in one of several acts forming a general system, as explanatory of other parts of the same system ; and this appears to be in obedience to the best established rules of exposition, and to be necessary to a sound construction of the law.

An objection was made to the claim of salvage by one of the counsel for the defendant in error, unconnected with the acts of congress, and which it is proper here to notice.

He states that to give title to salvage the means used must not only
p. 36 have produced the benefit, but must have | been used with that sole view. For this he cites Beawes *Lex Mercatoria* 158.

The principle is applied by Beawes to the single case of a vessel saved at sea by throwing overboard a part of her cargo. In that case the principle is unquestionably correct, and in the case of a re-capture it is as unquestionably incorrect. The re-captor is seldom actuated by the sole view of saving the vessel, and in no case of the sort has the enquiry ever been made.

It is then the opinion of the court on a consideration of the acts of congress, and of the circumstances of the case, that the re-capture of the Amelia was lawful, and that, if the claim to salvage be in other

respects well founded, there is nothing to defeat it in the character of the original taking.

It becomes then necessary to enquire—

2d. Whether there has been such a meritorious service rendered to the re-captured as entitles the re-captor to salvage.

The Amelia was a neutral ship, captured by a French cruizer, and re-captured while on her way to a French port, to be adjudged according to the laws of war.

It is stated to be the settled doctrine of the law of nations, that a neutral vessel captured by a belligerent is to be discharged without paying salvage: and for this several authorities have been quoted, and many more might certainly be cited. That such has been a general rule is not to be questioned. As little is it to be questioned that this rule is founded exclusively on the supposed safety of the neutral. It is expressly stated in the case of the *War Onskan*, cited from Robinson's reports, to be founded on this plain principle, 'that the liberation of a clear neutral from the hand of the enemy, is no essential service rendered to him, in as much as that the same enemy would be compelled by the tribunals of his own country after he had carried the neutral into port, to release him with costs and damages for the injurious seizure and detention.' It is not unfrequent to consider and speak of a | regular practice under a rule, as itself forming a rule. A regular course p. 37
of decisions on the text of the law, constitutes a rule of construction by which that text is to be applied to all similar cases: But alter the text, and the rule no longer governs. So in the case of salvage. The general principle is, that salvage is only payable where a meritorious service has been rendered. In the application of this principle, it has been decided that neutrals carried in by a belligerent for examination, being in no danger, receive no benefit from recapture; and ought not therefore to pay salvage.

The principle is that without benefit, salvage is not payable: and it is merely a consequence from this principle, which exempts re-captured neutrals from its payment. But let a nation change its laws and its practice on this subject; let its legislation be such as to subject to condemnation all neutrals captured by its cruizers, and who will say that no benefit is conferred by a re-capture? In such a course of things the state of the neutral is completely changed. So far from being safe, he is in as much danger of condemnation as if captured by his own declared enemy. A series of decisions then, and of rules founded on his supposed safety, no longer apply. Only those rules are applicable, which regulate a situation of actual danger. This is not, as it has been termed, a change of principle, but a preservation of principle by a practical application of it according to the original substantial good sense of the rule.

It becomes then necessary to enquire whether the laws of France were such as to have rendered the condemnation of the Amelia so extremely probable, as to create a case of such real danger, that her recapture by captain Talbot must be considered as a meritorious service entitling him to salvage.

To prove this the counsel for the plaintiff in error has offered several decrees of the French government, and especially one of the 18th of January, 1798.

Objections have been made to the reading of these decrees as being the laws of a foreign nation, and therefore facts, which like other facts,
p. 38 ought to have been | proved, and to have formed a part of the case stated for the consideration of the court.

That the laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts, and that this court, with respect to facts, is limited to the statement made in the court below, cannot be questioned. The real and only question is whether the public laws of a foreign nation, on a subject of common concern to all nations, promulgated by the governing powers of a country, can be noticed as law by a court of admiralty of that country, or must be still further proved as a fact.

The negative of this proposition has not been maintained in any of the authorities which have been adduced. On the contrary, several have been quoted, (and such seems to have been the general practice) in which the marine ordinances of a foreign nation are read as law without being proved as facts. It has been said that this is done by consent: that it is a matter of general convenience not to put parties to the trouble and expense of proving permanent and well known laws which it is in their power to prove; and this opinion is countenanced by the case cited from Douglas. If it be correct, yet this decree having been promulgated in the United States as the law of France, by the joint act of that department which is entrusted with foreign intercourse, and of that which is invested with the powers of war, seems to assume a character of notoriety which renders it admissible in our courts.

It is therefore the opinion of the court that the decree should be read as an authenticated copy of a public law of France interesting to all nations.

The decree ordains that 'the character of vessels, relative to their 'quality of neuter or enemy, shall be determined by their cargo; in 'consequence, every vessel found at sea, loaded in whole or in part 'with merchandize the production of England or her possessions, shall 'be declared good prize, whoever the owner of these goods or mer-'chandize may be.' |
p. 39 This decree subjects to condemnation in the courts of France a

neutral vessel laden, in whole or in part, with articles the growth of England or any of its possessions. A neutral thus circumstanced cannot be considered as in a state of safety. His re-captor cannot be said to have rendered him no service. It cannot reasonably be contended that he would have been discharged in the ports of the belligerent, with costs and damages.

Let us then enquire whether this was the situation of the Amelia. The first fact states her to have sailed from Calcutta in Bengal, in April, 1799, laden with a cargo of the product and manufactory of that country. Here it is contended that the whole of Bengal may possibly not be in possession of the English, and therefore it does not appear that the cargo was within the description of the decree. But to this it has been answered, that in enquiring whether the Amelia was in danger or not this court must put itself in the place of a French court of admiralty, and determine as such court would have determined. Doing this, there seems to be no reason to doubt that the cargo, without enquiring into the precise situation of the British power in every part of Bengal, being prima facie of the product and manufacture of a possession of England, would have been so considered, unless the contrary could have been plainly shewn.

The next fact relied on by the defendant in error is, that the Amelia was sent to be adjudged according to the laws of war, and from thence it is inferred that she could not have been judged according to the decree of the 18th of January.

It is to be remembered that these are the orders of the captor, and without a question, in the language of a French cruizer, a law of his own country furnishing a rule of conduct in time of war, will be spoken of as one of the laws of war.

But the third and fourth facts in the statement admit the Amelia, with her cargo, to have belonged to a citizen of Hamburgh, which city was not in a state of hostility with the republic of France, but was to be considered as neutral between the then belligerent powers. |

It has been contended that these facts not only do not show the re-captured vessel to have been one on which the decree could operate, but positively show that the decree could not have affected her. p. 40

The whole statement taken together amounts to nothing more than that Hamburgh was a neutral city ; and it is precisely against neutrals that the decree is in terms directed. To prove, therefore, that the Amelia was a neutral vessel, is to prove her within the very words of the decree, and consequently to establish the reality of her danger.

Among the very elaborate arguments which have been used in this case, there are some which the court deem it proper more particularly to notice.

It has been contended that this decree might have been merely in terrorem; that it might never have been executed; and that being in opposition to the law of nations, the court ought to presume it never would have been executed.

But the court cannot presume the laws of any country to have been enacted in terrorem, nor that they will be disregarded by its judicial authority. Their obligation on their own courts must be considered as complete; and without resorting either to public notoriety, or the declarations of our own laws on the subject, the decisions of the French courts must be admitted to have conformed to the rules prescribed by their government.

It has been contended that France is an independent nation, entitled to the benefits of the law of nations; and further, that if she has violated them, we ought not to violate them also, but ought to remonstrate against such misconduct.

These positions have never been controverted; but they lead to a very different result from that which they have been relied on as producing.

The respect due to France is totally unconnected with the danger
p. 41 in which her laws had placed the Amelia; nor | is France in any manner to be affected by the decree this court may pronounce. Her interest in the vessel was terminated by the re-capture, which was authorized by the state of hostility then subsisting between the two nations. From that time it has been a question only between the Amelia and the re-captor, with which France has nothing to do.

It is true that a violation of the law of nations by one power does not justify its violation by another; but that remonstrance is the proper course to be pursued, and this is the course which has been pursued. America did remonstrate, most earnestly remonstrate to France against the injuries committed on her; but remonstrance having failed, she appealed to a higher tribunal, and authorized limited hostilities. This was not violating the law of nations, but conforming to it. In the course of these limited hostilities the Amelia has been re-captured, and the enquiry now is, not whether the conduct of France would justify a departure from the law of nations, but what is the real law in the case. This depends on the danger from which she has been saved.

Much has been said about the general conduct of France and England on the seas, and it has been urged that the course of the latter has been still more injurious than that of the former. That is a consideration not to be taken up in this cause. Animadversions on either, in the present case, would be considered as extremely unbecoming the judges of this court, who have only to enquire what was the real danger in which the laws of one of the countries placed the Amelia, and from which she has been freed by her re-capture.

It has been contended that an illegal commission to take, given by France, cannot authorize our vessels to re-take; that we have no right by legislation to grant salvage out of the property of a citizen of Hamburgh, who might have objected to the condition of the service.

But it is not the authority given by the French government to capture neutrals, which is legalizing the re-capture made by capt. Talbot, it is the state of hostility between the two nations which is considered as having authorized that act. The re-capture having been made lawfully, then the right to salvage, on general principles, depends | on the p. 42
service rendered. We cannot presume this service to have been unacceptable to the Hamburgher, because it has bettered his condition; but a re-capture must always be made without consulting the re-captured. The act is one of the incidents of war, and is in itself only offensive as against the enemy. The subsequent fate of the re-captured depends on the service he has received, and on other circumstances.

To give a right to salvage, it is said there must be a contract either express or implied.

Had Hamburgh been in a state of declared war with France, the re-captured vessels of that city would be admitted to be liable to pay salvage. If a contract be necessary, from what circumstances would the law, in that state of things imply it? Clearly from the benefit received, and the risk incurred. If in the actual state of things there was also benefit and risk, then the same circumstances concur, and they warrant the same result.

It is also urged that to maintain this right, the danger ought not to be merely speculative, but must be imminent and the loss certain.

That a mere speculative danger will not be sufficient to entitle a person to salvage is unquestionably true. But that the danger must be such, that escape from it by other means was inevitable, can not be admitted.

In all the cases stated by the counsel for the defendant in error, safety by other means was possible, though not probable. The flames of a ship on fire might be extinguished by the crew, or by a sudden tempest. A ship on the rocks might possibly be got off by the aid of wind and tides without assistance from others. A vessel captured by an enemy might be separated from her captor, and if sailors had been placed on board the prize, a thousand accidents might possibly destroy them; or they might even be blown by a storm into a port of the country to which the prize vessel originally belonged.

It cannot therefore be necessary that the loss should be inevitably certain, but it is necessary that the danger should | be real and imminent. p. 43
It is believed to have been so in this case. The captured vessel was of such description that the law by which she was to be tried, condemned

her as good prize to the captor. Her danger then was real and imminent. The service rendered her was an essential service, and the court is therefore of opinion that the re-captor is entitled to salvage.

The next object of enquiry, is, what salvage ought to be allowed? The captors claim one half the gross value of the ship and cargo. To support this claim they rely on the act 'for the government of the navy of the United States,' passed the 2d of March, 1799. This act regulates the salvage payable on the ships and goods belonging to the citizens of the United States, or to the citizens or subjects of any nation in amity with the United States, re-taken from the enemy.

It has been contended that the case before the court is in the very words of the act. That the owner of the Amelia is a citizen of a state in amity with the United States, re-taken from the enemy. That the description would have been more limited, had the intention of the act been to restrain its application to a re-captured vessel belonging to a nation engaged with the United States against the same enemy.

The words of the act would certainly admit of this construction.

Against it, it has been urged, and we think with great force, that the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law. If the construction contended for be given to the act, it subjects to the same rate of salvage a re-captured neutral, and a re-captured belligerent vessel. Yet, according to the law of nations, a neutral is generally to be restored without salvage.

This argument, in the opinion of the court, derives great additional weight from the consideration that the act in question is not temporary, but permanent. It is not merely fitted to the then existing state of
p. 44 things, and | calculated to expire with them, but is a regulation applying to present and future times.

Whenever the danger resulting to captured neutrals from the laws of France should cease, then, according to the principles laid down in this decree, the liability of re-captured neutrals to the payment of salvage, would, in conformity with the general law and usage of nations, cease also. This event might have happened, and probably did happen, before hostilities between the United States and France were terminated by treaty. Yet, if this law applies to the case, salvage from a re-captured neutral would still be demandable.

This act then, if the words admit it, since it provides a permanent rule for the payment of salvage, ought to be construed to apply only to cases in which salvage is permanently payable.

On inspecting the clause in question, the court is struck with the description of those from whom the vessel is to be re-taken in order to come within the provisions of the act. The expression used is *the enemy*.

A vessel re-taken from the enemy. The enemy of whom? The court thinks it not unreasonable to answer, of both parties. By this construction the act of congress will never violate those principles which we believe, and which it is our duty to believe, the legislature of the United States will always hold sacred.

If this act does not comprehend the case, then the court is to decide, on a just estimate of the danger from which the re-captured was saved, and of the risk attending the re-taking of the vessel, what is a reasonable salvage. Considering the circumstances, and considering also what rule has been adopted in other courts of admiralty, one-sixth appears to be a reasonable allowance.

It is therefore the opinion of the court, that the decree of the circuit court, held for the district of New-York, was correct in reversing the decree of the district court, but not correct in decreeing the restoration of the Amelia without paying salvage. This court, therefore, is of opinion, that the decree, so far as the restoration of the | Amelia without salvage p. 45
is ordered, ought to be reversed, and that the Amelia and her cargo ought to be restored to the claimant, on paying for salvage one-sixth part of the nett value, after deducting therefrom the charges which have been incurred.

United States v. Schooner Peggy.

(1 Cranch, 103) 1801.

A final condemnation in an inferior court of admiralty, where a right of appeal exists and has been claimed, is not a *definitive* condemnation within the meaning of the 4th article of the convention with France, signed Sept. 30, 1800. The court is as much bound as the executive to take notice of a treaty, and will reverse the original decree of condemnation (although it was correct when made) and decree restoration of the property under the treaty made since the original condemnation. Quere. As to the extent of the term *high seas*?

ERROR to the circuit court for the district of Connecticut, on a question of prize.

The facts found and stated by judge Law, the district judge, were as follow:

'That the ship Trumbull, duly commissioned by the President of 'the United States, with instructions to take any armed French vessel 'or vessels sailing under authority, or pretence of authority from the 'French republic, which shall be found within the jurisdictional limits of 'the United States, *or elsewhere on the high seas*, &c. as set forth in said 'instructions; and said ship did on the 24th day of April last (April '1800) capture the schooner Peggy, *after running her ashore* a few miles 'to the westward of Port au Prince, within the *dominions and territory of* '*General Toussaint*, and has brought her into port as set forth in the libel, 'and it further appears that all the facts, contained in the claim, are

p. 104 'true[1]; whereupon this court | are of opinion that as it appears that the 'said schooner was solely upon a trading voyage and sailed under the 'permission of Toussaint with dispatches for the French government, 'under a convoy furnished by Toussaint, with directions to touch at 'Leogane for supplies, and that the arms she had on board must be pre-'sumed to be only for self defence; neither does it appear she had ever 'made, or attempted to make, any depredations, and that she was not 'such an armed vessel as was meant and intended by the laws of the 'United States should be subject to capture and condemnation; and 'that the situation she was in, at the time of capture, being aground '*within the territory and jurisdiction of Toussaint*, she was not on the high 'seas, so as to be intended to be within the instructions given to the 'commanders of American ships of war: Therefore, adjudge said schooner 'is not a lawful prize, and decree that said schooner with her cargo be 'restored to claimant.'

From this decree the attorney for the United States, in behalf of the United States and the commander, officers and crew of the Trumbull, appealed to the circuit court, in which Judge Cushing sat alone, as the district judge declined sitting in the cause, on account of the interest of his son who was one of the officers on board the Trumbull, at the time of capture, and who, if the schooner should be condemned, would be entitled to a share of the prize money.

The circuit court on the appeal found the following facts, and gave the following opinion and decree: |

p. 105 'That David Jewitt, commander of the said public armed vessel, 'called the Trumbull, being duly commissioned, and instructed by the 'President of the United States, as set forth in the said libel, did on or 'about the 23d of April last, capture the said schooner Peggy, after 'running her aground about pistol shot from the shore, a few miles to 'the westward of Port au Prince, called also Port Republican, on the 'coast of the island of Saint Domingo, and afterwards bring her into port, 'as set forth in the libel. That at the time of the capture of the said 'schooner there were ten persons aboard her. That she was then armed

[1] The material facts stated in the claim are, that the schooner was the property of citizens of the French republic; that she was permitted by Toussaint to receive on board the cargo which was on board at the time of capture; that she had dispatches from Toussaint to France; that she sailed by his authority on the 23d of April, for France, navigated by 10 men, including Buisson the claimant, and Gillibert the commander, and having on board 4 small 3 pound carriage guns, solely for defence against piratical assaults, and being under convoy of a tender, furnished by Toussaint. That on the 23d April, she was run ashore, a few miles to the westward of Port au Prince, *within the dominion, jurisdiction, and territory of general Toussaint, so that she was fast and tight aground;* at which time, and in which situation, the boats and crew of the Trumbull attacked and took possession of her, and got her off. That Toussaint then was, and still is, on terms of amity, commerce and friendship with the United States, duly entered into and ratified by treaty. That the schooner was on a lawful voyage for the sole purpose of trade; and not commissioned, or in a condition to annoy or injure the trade or commerce of the United States.

'with four carriage guns, being four pounders, with four swivel guns, 'six muskets, four pistols, four cutlasses, two axes, some boarding 'hatchets, tommahawks, and handcuffs. That she was a trading French 'vessel of about a hundred tons, then laden with coffee, sugar, and other 'merchandize. That she had come from Bourdeaux to Port au Prince, 'where the claimant had taken in said cargo, and from whence he sailed 'on or about the said 23d day of April with said schooner and cargo, 'having dispatches from general Toussaint for the French government. 'That the said Buisson sailed from Port au Prince as aforesaid with the 'permission and direction of general Toussaint to proceed to Bourdeaux; 'that said schooner so sailed from Port au Prince under convoy of an 'armed vessel by order of said Toussaint without a passport from Mr. 'Stevens, consul general of the United States at Saint Domingo, but that 'Buisson had been promised by Toussaint's brother that one should be 'obtained and sent him, which, however, was not done; that said schooner 'had sailed from Bourdeaux for Port au Prince with fifteen men, besides 'eight passengers (according to the roll of equipage) armed with some 'guns, swivels and muskets; that said captain Buisson was without any 'commission as for a vessel of war, and alleges that he was armed only 'for self defence. That at the time of said capture, the guns of said schooner 'were loaded with cannister shot, one of which being fired, the shot fell 'near the bow of the Trumbull; but the said Buisson declares that said 'gun was fired only as a signal to his convoy. That the said captain 'Buisson appeared to be in a disposition, and was prepared with force 'to resist the boats which were sent from the Trumbull to board him, 'a little | previous to the capture, in case of their attempting it; and that p. 106
'the said schooner and cargo are French property.

'Upon these facts the court is of opinion as follows, viz.

'However compassion may be moved in favour of the claimant by 'some circumstances; such as that he was charged with dispatches from 'general Toussaint, between whom and the United States there were 'some friendly arrangements respecting commerce; that he was not 'in a capacity of greatly annoying trade, from the fewness of his men; 'and his allegation that he was armed only in defence; yet as the court 'is bound by law, which makes no such distinctions; as armed French 'vessels are not protected by any treaty or convention; particularly 'not by the regulations between general Toussaint and the American 'consul; and as the said schooner Peggy was in a condition capable 'of annoying, and even of capturing single, unarmed trading vessels, 'unattended with convoy; The court cannot avoid being of opinion, 'that she falls within the description, and general design, of the expression 'of the law, an armed French vessel.

2dly. That she was captured on the high seas: the argument taken

'by the claimants counsel, from the extent of national jurisdiction on 'sea coasts bordering on the country, not applying to this case so as to 'acquit the said schooner; the sea coast of Saint Domingo, not being 'neutral; not made so by any treaty or convention; but to be considered 'as hostile, upon our present plan of laws of defence with respect to 'France; as much so as any part of the coast of France, as far as regards '*French armed vessels*.

'The court is therefore of opinion that the said schooner Peggy and 'cargo are lawful prize:

'It is therefore considered, decreed and adjudged by this court, that 'the decree of the district court respecting the same, as far as regards 'their acquittal, be, and the same is hereby reversed; and that the said
p. 107 'schooner | with her apparel, guns and appurtenances, and the goods and 'effects which were found on board of her at the time of capture, and 'brought into port as aforesaid, be and the same are hereby condemned 'as forfeited to the use of the United States, and of the officers and men 'of the said armed vessel called the Trumbull, one half thereof to the 'United States, the other half to the officers and men to be divided 'according to law; the said schooner Peggy being of inferior force to the 'said armed vessel called the Trumbull.'

This sentence and decree were pronounced on the 23d day of September, 1800.

During the present term, and before the court gave judgment upon this writ of error, viz. on the 21st of December, 1801, the convention with France was finally ratified by the President; the fourth article of which convention has these words:

'Property captured, and not yet *definitively* condemned, or which 'may be captured before the exchange of ratifications, (contraband 'goods destined to an enemy's port excepted) shall be mutually restored.' 'This article shall take effect from the date of the signature of the present 'convention. And if, from the date of the said signature, any property 'shall be condemned contrary to the intent of the said convention, before 'the knowledge of this stipulation shall be obtained; the property of 'condemned shall without delay be restored or paid for.'

On the 30th of September, 1800, this convention was signed by the respective plenipotentiaries of the two nations at Paris. On the 18th of February, 1801, it was ratified by the President of the United States, with the advice and consent of the Senate, excepting the 2d article, and with a limitation of the duration of the convention to the term of eight years. On the 31st of July, 1801, the ratifications were exchanged at Paris, with a proviso that the expunging of the 2d article should be considered as a renunciation of the respective pretensions which were the object of that article. |

This proviso being considered by the President as requiring a renewal of p. 108
the assent of the Senate, he sent it to them for their advice. They returned it with a resolve that they considered the convention as fully ratified.

Whereupon,

On the 21st of December, 1801, it was promulged by a proclamation of the President.

The controversy turned principally upon two points :

1st. Whether the capture could be considered as made on the *high seas*, according to the import of that term as used in the act of congress of July 9th, 1798, vol. 4. p. 163.

2d. Whether, by the sentence of condemnation by the circuit court on the 23d of September, 1800, the schooner Peggy could be considered as *definitively* condemned, within the meaning of the 4th article of the convention with France, signed at Paris on the 30th of September, 1800.

The writ of error was dated on the 2d of October, 1800.

Griswold and Bayard, for the captors.

Mason, for the claimant.[1]

The Chief Justice delivered the opinion of the court.

In this case the court is of opinion that the schooner Peggy is within the provisions of the treaty entered into with France and ought to be restored. This vessel is not considered as being definitively condemned. The argument at the bar which contends that because the sentence of the circuit court is denominated a final sentence, therefore its condemnation is definitive in the sense in which that term is used in the treaty, is not deemed a correct argument. A decree or sentence may be interlocutory or final in the court which pronounces it, and receives its | appella- p. 109
tion from its determining the power of that particular court over the subject to which it applies, or being only an intermediate order subject to the future control of the same court. The last decree of an inferior court is final in relation to the power of that court, but not in relation to the property itself, unless it be acquiesced under. The terms used in the treaty seem to apply to the actual condition of the property and to direct a restoration of that which is still in controversy between the parties. On any other construction the word *definitive* would be rendered useless and inoperative. Vessels are seldom if ever condemned but by a final sentence. An interlocutory order for a sale is not a condemnation. A stipulation then for the restoration of vessels not yet condemned, would on this construction comprehend as many cases as a stipulation for the restoration of such as are not yet definitively condemned. Every condemnation is final as to the court which pronounces it, and no other difference is perceived between a condemnation and a final condemnation, than

[1] I regret that not having notes of this case, I am unable to report the very ingenious arguments of the learned counsel.

that the one terminates definitively the controversy between the parties and the other leaves that controversy still depending. In this case the sentence of condemnation was appealed from, it might have been reversed, and therefore was not such a sentence as in the contemplation of the contracting parties, on a fair and honest construction of the contract, was designated as a definitive condemnation.

It has been urged that the court can take no notice of the stipulation for the restoration of property not yet definitively condemned, that the judges can only enquire whether the sentence was erroneous when delivered, and that if the judgment was correct it cannot be made otherwise by any thing subsequent to its rendition.

The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence its obligation on the courts of the United States must be admitted. It is certainly true that the execution of a contract between nations is to be demanded from, and, in the general, superintended by the executive of each nation, and therefore, whatever the decision of this court may be relative to the rights of parties litigating before it, the claim upon the nation, if unsatisfied, may still be
p. 110 asserted. | But yet where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress; and although restoration may be an executive, when viewed as a substantive, act independent of, and unconnected with, other circumstances, yet to condemn a vessel, the restoration of which is directed by a law of the land, would be a direct infraction of that law, and, of consequence, improper.

It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns where individual rights, acquired by war, are sacrificed for national purposes, the contract, making the sacrifice, ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

Alexander Murray, Esq. v. Schooner Charming Betsy.

(2 Cranch, 64) 1804.

An American vessel sold in a Danish island, to a person who was born in the United States, but who had *bona fide* become a burgher of that island, and sailing from thence to a French island, in *June* 1800, with a new cargo purchased by her new owner, and under the *Danish* flag, was not liable to seizure under the non-intercourse law of 27th of *February* 1800. If there was no *reasonable* ground of suspicion that she was a vessel trading contrary to that law, the commander of a *United States* ship of war, who seizes and sends her in, is liable for damages.

The report of the assessors appointed by the court of admiralty to assess the damages, ought to state the principles on which it is founded, and not a gross sum without explanation. An *American* citizen residing in a foreign country may acquire the commercial privileges attached to his *domicil*; and by making himself the subject of a foreign power he places himself out of the protection of the *United States*, while within the territory of the Sovereign to whom he has sworn allegiance.

Quere, whether a citizen of the *United States*, can divest himself absolutely of that character otherwise than in such manner as may be prescribed by law?

Whether, by becoming the subject of a foreign power, he is rescued from punishment for a crime against the *United States*?

What degree of arming constitutes an armed vessel?

THE facts of this case, are thus stated by the district judge in his decree.

'The libel, in this cause, is founded on the act entitled "An act 'further to suspend the commercial intercourse between the *United* 'States and *France*, and the dependencies thereof;" (*Vol.* 5. *c.* 10. *p.* 15. 'passed *February* 27, 1800) and states that the Schooner sailed from 'Baltimore, after the passing of that act, owned, hired or employed, by 'persons resident within the *United States*, or by citizens thereof resident 'elsewhere, bound to *Guadaloupe*, and was taken on the high seas, on 'the 1st of *June* 1800, by the libellant, then commander of the public 'armed ship the *Constellation*, in pursuance of instructions given to the 'libellant, by the President of the *United States*, *there being reason to suspect* 'her to be engaged in a traffic, or commerce contrary to the said act, &c.

'The claim and answer, replication and rejoinder, are referred to 'for a further statement of the proceedings | in this case, on all of which p. 65
'I ground my decree.

'On a careful attention to the exhibits and testimony in this cause, 'and after hearing of counsel, I am of opinion, that the following facts 'are either acknowledged in the proceedings, or satisfactorily proved.

'That on or about the 10th of *April* 1800, the schooner, now called 'the *Charming Betsy*, but then called the *Jane*, sailed from *Baltimore* 'in the district of *Maryland*, an *American* bottom, duly registered 'according to law, belonging to citizens of, and resident in, the *United* 'States, and regularly documented with *American* papers; that she 'was laden with a cargo belonging to citizens of the *United States*; that 'her destination was first to *St. Bartholomew's*, where the captain had 'orders to effect a sale of both vessel and cargo; but if a sale of the 'schooner could not be effected at *St. Bartholomew's*, which was to be

'considered the "*primary object*" of the voyage, the captain was to pro-
'ceed to *St. Thomas's*, with the vessel and such part of the flour as
'should be unsold, where he was to accomplish the sale. That although
'a sale of the cargo, consisting chiefly of flour was effected at *St. Bar-*
'*tholomew's*, yet the vessel could not there be advantageously disposed
'of, and the captain proceeded, according to his instructions to *St.*
'*Thomas's* where a *bona fide* sale was accomplished, by captain *James*
'*Phillips*, on behalf of the *American* owners, for a valuable considera-
'tion, to a certain *Jared Shattuck*, a resident merchant in the island of
'*St. Thomas*.

'That although it is granted, that *Jared Shattuck* was born in *Con-*
'*necticut* before the *American* revolution, yet he had removed long before
'any differences with *France*, in his early youth, to the island of *St.*
'*Thomas*, where he served his apprenticeship, intermarried, opened a
'house of trade, owned sundry vessels, and as it is said, lands; which
'none but *Danish* subjects were competent to hold and possess. About
'the year 1796, he became a *Danish* burger, invested with the privileges
'of a *Danish* subject, and owing allegiance to his *Danish* majesty. The
p. 66 'evidence on | this head is sufficient to satisfy me of these facts; though
'some of them might be more fully proved. It does not appear that
'*Jared Shattuck* ever returned to the *United States* to resume citizenship,
'but constantly resided, and had his *domicil*, both before and at the
'time of the purchase of the schooner *Jane*, at *St. Thomas's*. That
'although the schooner was armed and furnished with ammunition, on
'her sailing from *Baltimore*, and the cannon, arms and stores, were
'sold to *Jared Shattuck*, by a contract separate from that of the vessel,
'she was chiefly dismantled of these articles at *St. Thomas's*, a small
'part of the ammunition, and a trifling part of the small arms excepted.
'That the name of the said schooner was at *St. Thomas's* changed to
'that of the *Charming Betsy*, and she was documented with *Danish* papers,
'as the property of *Jared Shattuck*. That so being the *bona fide* property
'of *Jared Shattuck*, she took in a cargo belonging to him, and no other,
'as appears by the papers found on board and delivered to this court.

'That she sailed, with the said cargo, from *St. Thomas's* on or about
'the 25th day of *June* 1800, commanded by a certain *Thomas Wright*,
'a *Danish* burgher, and navigated according to the laws of *Denmark*, for
'aught that appears to the contrary, bound to the island of *Guadaloupe*.

'That on or about the first of *July* last, 1800, she was captured on
'her passage to *Guadaloupe*, by a *French* privateer, and a prize-master
'and seven or eight hands put on board. The *Danish* crew (except
'captain *Wright*, an old man and two boys,) being taken off by the
'*French* privateer. That on the 3d of the same *July*, she was boarded
'and taken possession of, by some of the officers and crew of the *Con-*

'*stellation*, under the orders of captain *Murray*, and sent into the port
'of *St. Pierre*, in *Martinique*, where she arrived on the 5th of the same
'month of *July*. I do not state the contents of a paper called a *proces*
'*verbal*, which however will appear among the exhibits, because in my
'opinion it contains statements, either contrary to the real facts, or
'illusory; and calculated to serve the purposes of the *French* | captors. p. 67
'Nor do I detail the number of cutlasses, a musket and a small quantity
'of ammunition found on board when the schooner was boarded by
'captain *Murray's* orders. The *Danish* papers were on board, and ex-
'cept the *proces verbal* formed by the *French* captors, no other ship's
'papers. The instructions to captain *Murray* from the *President of the*
'*United States* comprehend the case of a vessel found in the possession
'of *French* captors, but then it should seem it must be a vessel belonging
'to citizens of the *United States*. It does not appear that captain *Murray*
'had any knowledge of *Jared Shattuck* being a native of *Connecticut*,
'or of any of the *United States*, until he was informed by captain *Wright*
'at *Martinique*.

'It is unnecessary to go into any disquisition about the instructions
'to the commanders of public armed ships, whether they were directory
'to captain *Murray* in the case in question; and if so, whether they
'were, or not, strictly conformable to law does not finally justify an
'act which on investigation turns out to be illegal, either as it respects
'the municipal laws of our country, or the laws of nations. Captain
'*Murray's* respectable character, both as an officer and a citizen, forbids
'any idea of his intention to do a wanton act of violence towards either
'a citizen of the *United States*, or a subject of another nation. He, no
'doubt, thought it his duty to send the vessel in question, to the *United*
'*States* for adjudication. He had also reasons prevailing with him, to
'sell *Jared Shattuck's* cargo in *Martinique*. His sending the schooner
'to *Martinique* was evidently proper, and serviceable to the owner as
'she had not a sufficient number of the crew on board to navigate her.
'But the further proceeding turns out, in my opinion wrong. Whatever
'probable cause might appear to captain *Murray*, to justify his conduct,
'or excite suspicion at the time, he runs the risk of, and is amenable
'for consequences.

'On a full consideration of the facts and circumstances of this case,
'I am of opinion, that the schooner *Jane*, being the same in the libel
'mentioned, did | not sail from the *United States* with an intent to vio- p. 68
'late the act, for a breach whereof the libel is filed. That she did not
'belong, when she sailed from *St. Thomas* for *Guadaloupe*, to a citizen
'of the *United States*, but to a *Danish* subject. *Jared Shattuck* either
'never was a citizen of the *United States* under our present national
'arrangement, or if he should at any time have been so considered, he

'had lawfully expatriated himself, and became a subject of a friendly 'nation. No fraudulent intent appears in his case, either of eluding the 'laws of the *United States* in carrying on a covered trade by such ex- 'patriation, or that he became a *Danish* burgher for any purposes which 'are considered as exceptions to the general rule which seems estab- 'lished on the subject of the right of expatriation. That, being a *Danish* 'burgher and subject, he had a lawful right to trade to the island of '*Guadaloupe*, any law of the *United States* notwithstanding, in a vessel '*bona fide* purchased, either from citizens of the *United States* or any 'other vessel documented and adopted by the *Danish* laws. I do not 'rely more than it deserves, on the circumstance of *Jared Shattuck's* 'burghership, *of which the best evidence, to wit, the brief, or an authen- 'ticated copy, has not been produced.* I know well that this brief alone, 'unaccompanied by the strong ingredients in his case, might be falla- 'cious. I take the whole combination to satisfy me of his being *bona 'fide* a *Danish* adopted subject; and altogether it amounts, in my 'mind, to proof of expatriation. The captain (*Wright*) produces his '*Danish* burgher's brief. He is a native of *Scotland*. But even the '*British* case of *Pollard* v. *Bell*, 8. *T. R.* 435. to which I have been re- 'ferred, shews that, with all the inflexibility evidenced in the *British* 'code, on the point of expatriation, a vessel was held to be *Danish* 'property, if documented according to the *Danish* laws, though the 'captain, who had obtained a *Danish* burgher's brief, was a *Scotchman.* 'It shews too, that in the opinion of the *British* judges (who agree, on 'this point, with the general current of opinions of civilians and writers 'on general law,) the municipal laws or ordinances of a country do not 'control the laws of nations. The *British* courts have gone great lengths
p. 69 'to modify their ancient | feudal law of allegiance, so as to moderate its 'rigor, and adapt it to the state of the modern world, which has become 'most generally commercial. They hold it to be clearly settled, that 'although a natural born subject cannot throw off his allegiance to the 'king, but is always amenable for *criminal* acts against it, yet for com- 'mercial purposes, he may acquire the rights of a citizen of another 'country. *Com. Rep.* 677. 689. I cite *British* authorities, because they 'have been peculiarly tenacious on this subject. Naturalization in this 'country may sometimes be a mere cover, so may, and, no doubt, fre- 'quently are burgher's briefs. But the case of *Shattuck* is accompanied 'with so many corroborating circumstances, added to his brief, as to render 'it, if not incontrovertibly certain, at least an unfortunate case on which 'to rest a dispute as to the general subject of expatriation. I am not 'disposed to treat lightly the attachment a citizen of the *United States* 'ought to bear to his country. There are circumstances in which a 'citizen ought not to expatriate himself. He never should be con-

'sidered as having changed his allegiance, if mere temporary objects, 'fraudulent designs, or incomplete change of domicil, appear in proof. 'If there are any such in *Shattuck's* case, they do not appear, and there- 'fore I must take it for granted that they do not exist. That therefore 'the ultimate destruction of his voyage, and sale of his cargo, are illegal.

'The vessel must be restored, and the amount of sales of the cargo 'paid to the claimant, or his lawful agent, together with costs, and 'such damages as shall be assessed by the clerk of this court, who is 'hereby directed to inquire into and report the amount thereof. And 'for this purpose the clerk is directed to associate with himself two 'intelligent merchants of this district, and duly inquire what damage '*Jared Shattuck*, the owner of the schooner *Charming Betsy* and her 'cargo, hath sustained by reason of the premises. *Should it be the 'opinion of the clerk, and the assessors associated with him, that the officers 'and crew of the Constellation benefited the owner of the Charming Betsy, 'by the rescue from the French captors, they | should allow in the adjust-* p. 70 *'ment, reasonable compensation for this service.*

(Signed.) 'RICHARD PETERS.

'28th *April*, 1801.'

On the 15th of *May* following, upon the report of the clerk and assessors, a final decree was entered for 20,594 dollars and 16 cents damages, with costs.

From this decree the libellant appealed to the Circuit Court, who adjudged, 'that the decree of the District Court be *affirmed* so far as 'it directs restitution of the vessel, and payment to the claimant, of 'the *net proceeds of the sale of the cargo* in *Martinique*, deducting the 'costs and charges there, according to the account exhibited by captain '*Murray's* agent, being one of the exhibits in this cause; and that the 'said decree be reversed for the residue, each party to pay his own 'costs, and one moiety of the custody and wharfage bills for keeping 'the vessel until restitution to the claimant.'

From this decree both parties appealed to the supreme court.

The cause was argued at last term, by *Martin*, *Key*, and *Mason* for the claimant.

No counsel was present for the libellant.

For the claimant it was contended, that the sale of the schooner to *Shattuck* was *bona fide*, and that he was a *Danish* subject. That although she was in possession of *French* mariners, she was not an armed *French* vessel within the acts of congress, which authorised the capture of such vessels. That neutrals are not bound to take notice of hostilities between two nations, unless war has been declared.

That the right of search and seizure is incident only to a state of war. That neutrals are not bound to take notice of our municipal regulations.

That the non-intercourse act was simply a municipal regulation, binding
p. 71 only upon our own citizens, and had nothing to do with | the law of nations; it could give no right to search a neutral. *That in all cases where a seizure is made under a municipal law, probable cause is no justification, unless it is made so by the municipal law under which the seizure is made.*

As to the position, that the sale was *bona fide*, the counsel for the claimant relied on the evidence, which came up with the transcript of the record, which was very strong and satisfactory. Upon the question whether *Shattuck* was a *Danish* subject or a citizen of the *United States*, it was said, that although he was born in *Connecticut*, yet there was no evidence that he had ever resided in the *United States*, since their separation from *Great Britain*. But it appears by the testimony that he resided in *St. Thomas's* during his minority, and served his apprenticeship there. That he had married into a family in that island, had resided there ever since the year 1789, had complied with the laws which enabled him to become a burgher, and had carried on business as such, and had for some years been the owner of vessels and lands. Even if by birth he had been a citizen of the *United States*, he had a right to expatriate himself. He had at least the whole time of his minority, in which to make his election of what country he would become a citizen. Every citizen of the *United States*, has a right to expatriate himself and become a citizen of any other country which he may prefer, if it be done with a *bona fide and honest intention, at a proper time, and in a public manner*. While we are inviting all the people of the earth to become citizens of the *United States*, it surely does not become us to hold a contrary doctrine, and deny a similar choice to our own citizens. Circumstances may indeed shew the intention to be fraudulent and collusive, and merely for the purpose of illicit trade, &c. But such circumstances do not appear in the present case. *Shattuck* was fairly and *bona fide* domiciliated at St. Thomas's before our disputes arose with *France*. The act
p. 72 of Congress, 'further to suspend,' | &c. cannot, therefore, be considered as operating upon such a person. The first act to suspend the intercourse was passed on the 13th of June, 1798, *vol.* 4. *p.* 129, and expired with the end of the next session of Congress. The next act, 'further to suspend,' &c. was passed on the 9th of *February*, 1799, *vol.* 4. *p.* 244, and expired on the 3d of *March*, 1800. The act upon which the present libel is founded, and which has the same title with the last, was passed on the 27th of *February*, 1800, *vol.* 5. *p.* 15. All the acts are confined in their operations to persons resident *within* the United States, or under their *protection*.

She was not such an armed French vessel as comes within the description of those acts of Congress, which authorised the hostilities with France. She had only one musket, twelve ounces of powder, and twelve

ounces of lead. The only evidence of further arms arises from the deposition of one *M'Farlan*. But he did not go on board of her till some days after the capture, and his deposition is inadmissible testimony, because he was entitled to a share of the prize money if the vessel should be condemned; and although a release from him to captain *Murray* appears among the papers, yet that release was not made until after the deposition was taken; and the fact is expressly contradicted by other testimony. The mere possession by nine Frenchmen did not constitute her an armed vessel. She was unable to annoy the commerce of the United States, which was the reason of the adjudication of this court, in the case of the *Amelia*, (See 1 *Cra. Rep.* 1. *Talbot v. Seeman.*) The *proces verbal* is no evidence of any fact but its own existence. If she had arms they ought to have been brought in, as the only competent evidence of that fact. No arms are libelled, and none appear, by the account of sales, to have been sold in *Martinique.*

It being then a neutral unarmed vessel, captain *Murray* had no right to seize and send her in. A right to search a neutral arises only from a state of public known war, and not from a municipal regulation. In time of peace the flag is to be respected. Until war is declared, neutrals are not bound to take notice of it.

The decrees of both the courts below have decided, that the vessel was not liable to capture. The only question is, whether the claimant is entitled to *damages?* Captain *Murray* has libelled her upon the non-intercourse act. He does not state that he seized her because she was a *French* armed vessel, although he | states her to be armed at the time p. 73
of capture. It has also been decided by both the courts that she is *Danish* property. If an American vessel had been illegally captured by captain *Murray*, he would have been liable for damages; *a fortiori* in the case of a foreign vessel, where, from motives of public policy, our conduct ought not only to be just but liberal.

In cases of personal arrest, if no crime has in fact been committed, *probable cause* is not a justification, unless it be made so by municipal law. As in the case of *Hue and Cry*, he who raises it is liable if it be false.

If the sheriff has a writ against A, and B is shewn to him as the person, and he arrests B instead of A, he is liable to an action of trespass at the suit of B. 1 *Buls.* 149. *Wale v. Hill.* So if he replevies wrong goods, or takes the goods of one upon a *fi. fa.* against another. In these cases it is no justification to the officer that he was informed, or believed he was right. He must in all cases seize at his peril. So it is with all other officers, such as those of the revenue, &c. *probable cause* is not sufficient to justify, unless the law makes it a justification. If the information is at *common* law for the thing seized and the seizure is found to have been illegally made, the injured party must bring his action of

trespass; but by the course of the admiralty, the *captor*, being in court, is liable to a decree against him for damages. 2 *Rob.* 202. (*The Fabius.*) The case of *Wale* v. *Hill*, in 1 *Bulstrode* 149, shews that where a crime has not been committed, there probable cause can be no justification. But where a crime has been committed, the party arresting cannot justify by the suspicion of others; it must be upon his own suspicion.

In the case of *Papillon* v. *Buckner*, *Hardr.* 478, although the goods seized had been condemned by the commissioners of excise, yet it was not held to be a good justification. In 1 *Dall.* 182. *Purviance* v. *Angus*, it was held that an error in judgment would not excuse an illegal capture;
p. 74 and in *Leglise* v. *Champante*, | 2 *Str.* 820, it is adjudged that probable cause of seizure will not justify the officer.[1]

In 3d *Anstruther* 896, is a case of seizure of *hides*, where no provision was made in the law that probable cause should be a justification. This case cites 7 *T. R.* 53, *Pickering* v. *Truste*. For what reason do the revenue laws provide that probable cause shall be a justification, if it would be so without such a provision? In these cases the injury by improper seizures can be but small, compared with those which might arise under the non-intercourse law. *Great Britain* has never made probable cause, an excuse for seizing a neutral vessel for violating her municipal laws. A neutral vessel is only liable to your municipal regulations while in your territorial jurisdiction. But as soon as she gets to sea, you have lost your remedy. You cannot seize her on the high seas. Even in *Great Britain*, if a vessel gets out of the jurisdiction of one court of admiralty, she cannot be seized in another. It is admitted that a law may be passed authorising such a seizure, but then it becomes a question between the two nations. If the present circumstances are sufficient to raise a probable cause for the seizure, and if such probable cause is a justification, it will destroy the trade of the *Danish* islands. The inhabitants speak our language, they buy our ships, &c. It will be highly injurious to the interests of the *United States*; and this court will consider what cause of complaint it would furnish to the *Danish* nation. If a private armed vessel had made this seizure, the captain and owners would have been clearly liable on their bond, which the law obliges them to give. The object of this act of Congress, was more to

[1] Taylor Ch. J. observed, that this case was overruled two years afterwards, in a case cited in a note to *Gwillim's edition of Bac. ab.** The case cited in the note is from 12 *Vin.* 173. *Tit. evidence. P. b.* 6. in which it is said 'that Lord Ch. *Baron Bury*, '*Montague* and *Page*, against *Price*, held that where an officer had made a seizure, 'and there was an information upon it, &c. which went in favour of the party who 'afterwards brings trespass; the shewing these proceedings was sufficient to excuse 'the officer: It was competent to make out a probable cause for his doing the act. '*Mich.* 6 *Geo.*'

* The case of *Leglise v. Champante* was in 2 *Geo.* 2. That cited in the note to *Bac. ab.* referred to by the Ch. J. was in 6 *Geo.* 1. The mistake arises from the note in *Gwillim's* edition not mentioning the date of the case cited from *Viner*.

prevent our vessels falling into the hands of the *French*, than to make it a war measure by starving the *French* islands. |

Even if a *Danish* vessel should carry *American* papers and *American* p. 75
colours, it would be no justification. In a state of peace we have no right to say they shall not use them if they please. In time of war, double papers, or throwing over papers, are probable causes of seizure, but this does not alter the property; it is no cause of condemnation. The vessel is to be restored, but without damages.

The mode of ascertaining the damages adopted by the district court, is conformable to the usual practice in courts of admiralty. See *Marriott's Reports;* and in the same book, p. 184, in the case of the *Vanderlee*, liberal damages were given.

In the revenue laws of the *United States*, *vol.* 4. *p.* 391, probable cause is made an excuse for the seizure; but no such provision is, or ought to have been made in the non-intercourse law. The powers given were so liable to abuse, that the commander ought to act at his peril.

The Ch. J. mentioned the case of the *Sally, capt. Joy*, in 2 *Rob.* 185. (*Amer.* Ed.) where a court of vice-admiralty had decreed, in a revenue case, that there was no probable cause of seizure.

This cause came on again to be argued at this term by *Dallas* for the libellant, and *Martin* and *Key* for the claimant.

Dallas, as a preliminary remark, observed, that the Judge of the district court had referred to the clerk and his associates to ascertain, whether any and what salvage should be allowed. This was an improper delegation of his authority, not warranted by the practice of courts of admiralty, or by the nature of his office. Although they had not reported upon this point, yet he submitted it to the court for their consideration.

After stating the facts which appeared upon the record, and such as were either admitted or proved, he divided his argument into three general points.

1. That *Jared Shattuck* was a citizen of the *United States*, at the time of capture and recapture; and therefore | the vessel was subject p. 76
to seizure and condemnation, under the act of Congress usually called the non-intercourse act.

2. That she was in danger of condemnation by the *French*, and therefore, if not liable to condemnation under the act of Congress, capt. *Murray* was at least entitled to salvage.

3. That if neither of the two former positions can be maintained, yet captain *Murray* had probable cause to seize and bring her in, and therefore he ought not to be decreed to pay damages.

1. The vessel was liable to seizure and condemnation under the *non-intercourse act; Shattuck* being a citizen of the *United States*, at the time of recapture.

Captain *Murray's* authority to capture the *Charming Betsy*, depends upon the municipal laws of the *United States*, expounded by his instructions, and the law of nations.

Before the non-intercourse act, measures had been taken by Congress to prevent and repel the injuries to our commerce which were daily perpetrated by *French* cruizers.

By the act of 28 *May*, 1798, *vol.* 4. *p.* 120, authority was given to capture 'armed vessels sailing under authority or pretence of authority from the republic of *France*,' &c. and to retake any captured *American* vessel.

The act of 28 *June*, 1798, *vol.* 4. *p.* 153, regulates the proceedings against such vessels when captured, ascertains the rate of salvage for vessels recaptured, and provides for the confinement of prisoners, &c.

The act of *July* 9, 1798, *vol.* 4. *p.* 163, authorises the capture of armed *French* vessels any where upon the high seas—and provides for the granting commissions to private armed vessels, &c.

The right to *retake* an armed, or unarmed neutral vessel in the hands of the French, is no where expressly given; but is an incident growing
p. 77 out of the state of war; | and is implied in several acts of Congress. This was decided in the case of *Talbot* v. *Seeman* in this court, at *Aug. term*, 1801.[1]

The right of recapture, carrying with it the right of salvage, gave the right of bringing into port; and that port must be a port of the captor.

The first non-intercourse act was passed *June* 13, 1798, *vol.* 4. *p.* 129 —A similar act was passed *Feb.* 9, 1799, *vol.* 4. *p.* 244.

The act upon which the present libel is founded was passed *Feb.* 27, 1800. *Vol.* 5. *p.* 15.

These are not to be considered as mere municipal laws for the regulation of our own commerce, but as part of the war measures which it was found necessary at that time to adopt. It was *quoad hoc* tantamount to a declaration of war.

Happily there is not, and has not been, in the practice of our government, an established form of declaring war.

Congress have the power, and may by one general act, or by a variety of acts, place the nation in a state of war. As far as Congress have thought proper to legislate us into a state of war, the law of nations in war is to apply.

By the general laws of war, a belligerent has a right not only to search for her enemy, but for her citizens trading with her enemy. If authorities for this position were necessary, a variety of cases decided by Sir *William Scott* might be cited.

[1] 1 Cranch, 33.

As to the present case, *France* was to be considered as our enemy. The *non-intercourse act* of 1800, prohibits all commercial intercourse ' between any person or persons resident within the *United States*, or ' under their *protection*, and any person or persons resident within the ' territories of the *French* republic, or any of the dependencies thereof,' And declares that ' any ship or vessel, owned, hired, or employed, in ' whole, or in part, by any person or persons resident within the *United* ' *States* or *any citizen* | or citizens thereof *resident elsewhere*,' &c. ' shall be p. 78 ' forfeited and may be seized and condemned.'

A citizen of the *United States*, resident ' *elsewhere*,' must mean a citizen resident in a neutral country. If *Shattuck* was such a citizen, the case is clearly within the statute. It is not necessary that the vessel should be registered as an *American* vessel; it is sufficient if *owned* by a citizen of the *United States*. Registering is only necessary to give the vessel the privileges of an *American* bottom. Nor is it necessary that she should have been built in the *United States*.

By the 8th section of the act of *27th Feb.* 1800, *vol.* 5. *p.* 20, reasonable suspicion is made a justification of seizure, and sending in for adjudication. The officer is bound to act upon suspicion—and that suspicion applies both to the character of the vessel, and to the nature of the voyage.

Although the act of congress mentions only vessels of the *United States*, still from the nature of the case, the right to seize and send in must extend to *apparent* as well as *real American* vessels.

Such is the cotemporaneous exposition given by the instructions of the executive.[1]

The words of these instructions are ' you are not only to do all that ' in you lies, to prevent all intercourse *whether direct or circuitous*, between ' the ports of the *United States*, and those of France and her dependen- ' cies, in cases where the vessels or cargoes are *apparently*, as well as ' *really American*, and protected by *American* papers only, but you are ' to be vigilant that vessels or | cargoes really *American*, but covered by p. 79 ' *Danish* or other foreign papers, and bound to *or from French* ports, do ' not escape you.'

The law and the instructions having thus made it his duty to act on reasonable suspicion, he must be safe though the ground of suspicion should eventually be removed.

[1] Upon Mr. Dallas's offering to read the instructions.

Chase J. said, he was always against reading the instructions of the executive; because if they go no further than the law, they are unnecessary; if they exceed it, they are not warranted.

Marshall, Ch. J. I understand it to be admitted by both parties, that the instructions are part of the record. The construction, or the effect they are to have, will be the subject of further consideration. *They may be read.*

Chase, J. I can only say, I am against it, and I wish it to be generally known I think it a bad practice, and shall always give my voice against it.

Under our municipal law, therefore, the following propositions are maintainable.

1. That a vessel captured by the *French*, sails under *French* authority; and if armed, is, *quoad hoc*, a *French* armed vessel. The degree of arming is to be tested by the capacity to annoy the unarmed commerce of the *United States*.

2. The right to recapture an unarmed neutral, is an incident of the war, and implied in the regulations of congress.

3. The non-intercourse law justifies the seizure of *apparent*, as well as of real *American* vessels.

Nor does this doctrine militate with the law of nations. A war in fact existed between the *United States*, and *France*. An army was raised, a navy equipped, treaties were annulled, the intercourse was prohibited, and commissions were granted to private armed vessels. Every instrument of war was employed; but its operation was confined to the *vessels of war* of *France* upon the high seas.

So far as the war was allowed, the laws of war attached.

That it was a *public war*, was decided in the case of *Bas* v. *Tingy*, in this court, *Feb. Term*, 1800.

No authorities are necessary to shew that a state of war may exist without a public declaration. And the right to search follows the state of war. *Vattel, B.* 3. *c.* 7. § 114—1. *Rob.* 304. (The *Maria,*) 8 *Term. Rep.* 234. *Garrels v. Kensington.* Whether the vessel was *American* or *Danish*, she was taken out of the hands of *our enemy.* |

p. 80 The law of nations in war, gives not only the right to search a neutral, but a right to recapture from the enemy. On this point the case of *Talbot* v. *Seeman* is decisive, both as to the law of nations, and as to the acts of Congress, and that the rule applies as well to a *partial* as to a *general* war.

Captain *Murray's* authority, then, was derived not only from our municipal law, and his instructions; but from the law of nations. If he has pursued his authority in an honest and reasonable manner, although he may not be entitled to reward, yet he cannot deserve punishment.

It remains to consider, whether the vessel was, in fact, liable to seizure and condemnation.

What were the *general facts* to create suspicion *at the time?*

1. The vessel was originally *American*. The transfer was recent and since the non-intercourse law. The voyage was to a dependency of the *French* republic and therefore prohibited, if she was really an *American* vessel.

2. The owner was an *American* by birth. The captain was a *Scotchman*. The crew were not *Danes*, but chiefly *Americans*, who came from *Baltimore*.

3. The *proces verbal* calls her an *American* vessel; which was corroborated by the declarations of some of the crew.

4. The practice of the inhabitants of the *Danish* islands, to cover *American* property in such voyages.

What was there *then* to dispel the cloud of suspicion, raised by these circumstances?

1. The declarations of *Wright*, the captain, whose testimony was interested, inconsistent with itself, and contradicted by others.

2. The documents found on board.

These were no other than would have been found, if fraud had been intended. These were |

1. The sea letter or pass from the governor-general of the *Danish* p. 81
islands, who did not reside at *St. Thomas's*, but at *St. Croix*. It states only by way of recital that the vessel was the property of *Jared Shattuck* a *burgher and inhabitant* of St. Thomas's. It does not state that he was naturalized or a subject of *Denmark*.

2. The muster roll, which states the names and number of the captain and crew, who were ten besides the captain, viz. *Wm. Wright*, captain, *David Weems*, *John Robinson*, *Jacob Davidson*, *John Lampey*, *John Nicholas*, *Frederick Jansey*, *George Williamson*, *William George*, *Prudentio*, a *Corsican*, and *Davy Johnson*, a *Norwegian*. There is but *one foreign* name in the whole. *Wright* in his deposition says, that three were *Americans*, one a *Norwegian* and the rest were *Danes*, *Dutch* and *Spaniards*.

The muster roll was not on oath, but was the mere *declaration* of the owner.

3. The *invoice*, which only says that *Shattuck* was the owner of the cargo.

4. The bill of lading, which says that he was the shipper.

5. The certificate of the oath of property of the *Cargo*, states only by way of recital, that *Shattuck*, a *burgher, inhabitant* and *subject* &c. was the owner of the *Cargo*, but says nothing of the property in the *vessel*.

By comparing this certificate with the oath itself, it appears that the word '*subject*' has been inserted by the officer and was not in the original oath.

6. *Shattuck's* instructions to captain *Wright*.

7. The bill of sale by Phillips, the agent of the American owners, to *Shattuck*—but his authority to make the sale was not on board. To shew what little credit such documents are entitled to, he cited the opinion of Sir *W. Scott*, in the case of the *Vigilantia*, 1 *Rob.* 6, 7, *and* 8. *Amer. ed.* and in the case of the Odin. 1. *Rob.* 208, 211.

The whole evidence on board was a mere custom-house affair, all depending upon his own oath of property. His | burgher's brief was not p. 82

on board, nor did it appear even by his own oath, that *Shattuck* was a burgher. And no document is yet produced in which he undertakes to swear that he is a Danish subject.

Such documents could not remove a reasonable suspicion founded upon such strong facts.

There could never be a seizure upon suspicion, if this was not warrantable at the time.

What has appeared since to remove the suspicion, and to prove *Shattuck* to be a Danish subject ?

All the original facts remain, and the case rests on *Shattuck's expatriation*, whence arise two inquiries.

1. As to the right, in point of law, to expatriate.

2. As to the exercise of the right, *in fact.*

1. As to the right of expatriation.

He was a native of Connecticut, and, for aught that appears in the record, remained here until the year 1789, when we first hear of him in the island of St. Thomas's. This was after the revolution, and therefore there can be no question as to *election*, at least there is no proof of his election to become a subject of Denmark.

If the account of the case of *Isaac Williams*, (1. *Tucker's Blackstone*, *part* 1, *appendix*, *p.* 436) [1] is correct, it was | the opinion of *Ch. J. Elsworth*, p. 83 that a citizen of the *United States* could not expatriate himself. That

[1] The state of the case and the opinion of *Ch. J. Elsworth*, as extracted by Judge *Tucker*, from '*The National Magazine*,' *No.* 3, *p.* 254, are as follow.

On the trial of *Isaac Williams* in the *District* (*qu. Circuit ?*) Court of *Connecticut*, *Feb.* 27, 1797, for accepting a commission under the *French* republic, and under the authority thereof committing acts of hostility against *Great Britain*, the defendant alleged, and offered to prove, that he had expatriated himself from the *United States* and become a *French* citizen before the commencement of the war between *France* and *England*. This produced a question as to the right of *expatriation*, when Judge *Elsworth*, then chief Justice of the *United States*, is said to have delivered an opinion to the following effect.

'The common law of this country remains the same as it was before the revolution. 'The present question is to be decided by two great principles ; one is, that all 'the members of a civil community are bound to each other by compact ; the 'other is, that one of the parties to this compact cannot dissolve it by his own act. 'The compact between our community and its members is, that the community 'shall protect its members ; and on the part of the members, that they will at all 'times be obedient to the laws of the community and faithful to its defence. It 'necessarily results that the member cannot dissolve the compact without the 'consent, or default of the community. There has been no consent, no default. 'Express consent is not claimed ; but it is argued that the consent of the community 'is implied, by its policy, its condition, and its acts. In countries so crowded with 'inhabitants that the means of subsistence are difficult to be obtained, it is reason 'and policy to permit emigration ; but our policy is different, for our country is 'but scarcely settled, and we have no inhabitants to spare. Consent has been argued 'from the condition of the country, because we are in a state of peace. But though 'we were in peace, the war had commenced in *Europe ;* we wished to have nothing 'to do with the war—but the war would have something to do with us. It has been 'difficult for us to keep out of the war—the progress of it has threatened to involve 'us. It has been necessary for our government to be vigilant in restraining our own 'citizens from those acts which would involve us in hostilities.

'The most visionary writers on this subject do not contend for the principle

learned Judge is reported to have said in that case, that the common law of this country remains the same as it was before the revolution.

But in the case of *Jansen v. Talbot*, 3 *Dall.* 133, this Court inclined to the opinion that the right exists, but the difficulty was that the law had not pointed out the mode of election and of proof.

It must be admitted that the right does exist, but its exercise must be accompanied by three circumstances.

1. Fitness in point of time.
2. Fairness of intent. |
3. Publicity of the act. p. 84

But the right of expatriation, has certain characteristicks, which distinguish it from a *locomotive* right, or a right to change the *domicil.*

By expatriation the party ceases to be a citizen and becomes an alien. If he would again become a citizen, he must comply with the terms of the law of naturalization of the country, although he was a native.

But by a mere removal to another country for purposes of trade, whatever privileges he may acquire in that country, he does not cease to be a citizen of this.

With respect to other parties at war, the place of *domicil* determines his character, enemy, or neutral, *as to trade.* But with respect to his own country, *the change of place alone* does not justify his trading with her enemy ; and he is still subject to such of her laws as apply to citizens residing abroad. 1 *Rob.* 165. (*The Hoop.*) 1 *Term Rep.* 84. *Gist v. Mason,* and particularly 8 *Term Rep.* 548. *Potts v. Bell,* where this principle is advanced by Doct. *Nicholl,* the king's advocate, *in p.* 555, admitted by Doct. *Swabey in p.* 561, and decided by the court.

This principle of general law is fortified by the positive prohibition of the act of congress.

In *France* the character of *French* citizen remains until a naturalization in a foreign country. In the *United States* we require an oath of abjuration, before we admit a person to be naturalized.

If he was naturalized, he has done an act disclaiming the protection of the *United States,* and is no longer bound to his allegiance. But if he has acquired only a special privilege to trade, it must be subject to the laws of his country.

'in the unlimited extent, that a citizen may at any, and at all times, renounce 'his own, and join himself to a foreign country.

'Consent has been argued from the acts of our government permitting the 'naturalization of foreigners. When a foreigner presents himself here, we do not 'inquire what his relation is to his own country ; we have not the means of knowing, 'and the inquiry would be indelicate ; we leave *him* to judge of that. If he em- 'barrasses himself by contracting contradictory obligations, the fault and folly 'are his own ; but this implies no consent of the government that our own citizens 'should also expatriate themselves. It is therefore my opinion, that these facts 'which the prisoner offers to prove in his defence, are totally irrelevant,' &c. The prisoner was accordingly found guilty, fined and imprisoned.

2. But has he in fact exercised the right of expatriation? And is it proved by legal evidence?

p. 85 His birth is *prima facie* evidence that he is a citizen | of the *United States* and throws the burden of proof upon *him*. No law has been shewn by which he could be a naturalized *subject* of *Denmark*, nor has he himself ever pretended to be more than a *burgher of St. Thomas's*. What is the character of *burgher*, and what is the nature of a *burgher's brief?*

It is said that to entitle a person to own ships, there must have been a previous residence; but no residence is necessary to enable a man to be a captain of a Danish vessel.

It is a mere licence to trade—a permit to bear the flag of *Denmark*—like the freedom of a corporation. It implies neither expatriation, an oath of allegiance, nor residence. 1 *Rob.* 133. *The Argo*, 8 *Term Rep.* 434, *Pollard* v. *Bell*. These cases shew with what facility a man may become a burgher; that it is a mere matter of purchase, and that it is a character which may be taken up and laid aside at pleasure, to answer the purposes of trade.

But there is no evidence that he ever obtained even this *burgher's brief*. He went from *Connecticut*, a lad, an apprentice or clerk in 1788 or 1789. He was not seen in business there until 1795 or 1796. In going in 1789, he had no motive to expatriate himself, as there was then no war. We find him first trading in 1796, *after the war*, and the law of *Denmark* forbids a naturalization in time of war.

At what time then did he become a *burgher?* If he ever did become such in fact, and it was *in time*, he can prove it by the record. *Wright's* burgher's brief is produced and shews that they are matters of record. The *brief, itself* then, or a copy from the record duly authenticated, is the *best* evidence of the fact, and is in the power of the party to produce.

Why is it withheld, and other *ex parte* evidence picked up *there*, and witnesses examined here? All the evidence they have produced is merely matter of inference. They have examined witnesses to prove that he carried on trade at *St. Thomas's*, owned ships and land, married and resided there. By the depositions they prove that a man is not by law permitted to do these things without being *a burgher;* and hence they infer his *burghership*. |

p. 86 These facts are equivocal in themselves, and not well proved.

Certificates of citizenship are easily obtained, but are not always true. This is noticed by Sir *W. Scott* in the cases before cited. A case happened in this country, 2 *Dall.* 370, *U.S.* v. *Gallato*, where a person having taken the oath of allegiance to *Pennsylvania*, agreeably to the naturalization act of that state, obtained a certificate from a magistrate confirmed by the attestation of the supreme executive of the state, that he was a citizen of the *U. States*. But upon a trial in the circuit court

of *Pennsylvania*, it was adjudged that he was not a citizen. Captain *Barney* also went to *France*, became a citizen, took command of a *French* ship of war, returned to this country, and is now *certified* to be a citizen of the *U.S.* So in the case of the information against the ship *John and Alice*, Captain *Whitesides*, he was generally supposed to be a citizen of the *U.S.*

On the trial, evidence of his citizenship was called for, when it appeared that his father brought him into this country in the year 1784, and remained here until 1792, when the father died. Neither he nor his father were naturalized, and the vessel was condemned. These instances shew the danger of crediting such custom-house certificates.

All these certificates, in the present case do not form the *best* evidence, because better is still in the possession of the party, and he ought to produce it.

The general and fundamental rules of evidence are the same in courts of admiralty as in courts of common law. If they appear to relax, it is only in that stage of the business where they are obliged to act upon suspicion.

In the present case the opinion of *merchants only* is taken as to the *laws* of *Denmark*.—No *judicial* character, not even a *lawyer* was applied to. Certificates of merchants are no evidence of the law. 1 *Rob.* 58. (*The Santa Crux.*)

The evidence offered is both *ex parte*, and *ex post facto*. Fraud is not to be presumed, but why was not the *burgher's* | *brief* produced, as p. 87
well as the other papers, such as the oath of property, &c. when it was certainly the most important paper in the case?

The only reason which can be given, is, that it did not exist. It was a case like that of Captain *Whitesides*, where people were led into a mistake from the length of his residence, and from having seen him there from the time of his youth.

Upon the whole then we have a right to conclude that *Jared Shattuck* was not a *Danish* subject—or that if he was, the fact is not proved, and therefore he remains a citizen of the *U.S.* in the words of the act of congress, '*residing elsewhere.*'

The consequence must be a condemnation of the vessel.

II. She was in danger of condemnation in the *French* courts of admiralty, and therefore Captain *Murray* is intitled to *salvage*.

This depends 1. on the right to retake—2. on the degree of danger—and 3. the service rendered.

1. He had a right to retake, on the ground of suspicion of illicit trade, in violation of the *non-intercourse law*, as well as on the ground of her being a vessel sailing under *French* authority, and so armed as to be able to annoy unarmed *American* vessels. He had also a right to bring her in for salvage, if a service was rendered.

If his right to retake depends upon the suspicion of illicit trade, or upon her being a *French* armed vessel, he could take her only into a port of the *U.S.*

The point of *illicit trade* has already been discussed. That the vessel was sailing under *French* authority is certain; the only question is whether she was capable of annoying our commerce.

p. 88 She had port-holes, a musket, powder and balls, and | eight *Frenchmen*, who probably, as is usual, had each a cutlass. Vessels have been captured without a single musket. Three or four cutlasses are often found sufficient.

The vessel was sufficiently armed to justify Captain *Murray* under his instructions in bringing her in.

If then the taking was lawful, has she been saved from such danger as to entitle Captain *Murray* to salvage?

There is evidence that Captain *Wright* requested Captain *Murray* to take the vessel to prevent her falling into the hands of the English. He consented to be carried into *Martinique*. He protested only against the privateer, not against Captain *Murray*. His letter to Captain *Murray* does not complain of the *recapture*, but of the *detention*. The taking was an act of humanity, for if Captain *Murray* had taken out the *French men*, and left the vessel with only Captain *Wright* and the boy, they could not have navigated her into port, and she must have been lost at sea, or fallen a prey to the brigands of the islands. This alone was a service which ought to be rewarded with salvage.

But she was in danger of condemnation in the *French* courts of admiralty.

The case of *Talbot* v. *Seeman* has confirmed the principle adopted by Sir *W. Scott* in the case of the *War Onskan*, 2 *Rob.* 246. that the departure of *France* from the general principles of the law of nations, varied the rule that salvage is not due for the recapture of a neutral out of the hands of her friend; and that the general conduct of *France* was such as to render the recapture of a neutral out of *her* hands, an essential service which would intitle the recaptors to salvage. If she had been carried into a *French* port, how unequal would have been the conflict? Who would have been believed, the privateer or the claimant? The *Danish* papers would have been considered only as a cover for *American* property. The danger is shewn by the apprehensions of Captain *Wright* and his crew; by the declarations of the privateer; by the *proces verbal;* and by the actual imprisonment of the crew. |

p. 89 But independent of the general misconduct of *France*, there are several *French* ordinances under which she might have been condemned. The case of *Pollard* v. *Bell*, 8 *Term Rep.* 444, shews that such ordinances may justify the condemnation. The case of *Bernardi* v. *Motteaux*,

Doug. 575, shews that the *French* courts actually do proceed to condemnation upon them, as in the case of *throwing over papers*, &c. So in the case of *Mayne* v. *Walter*, *Park on Insurance*, 414, (363) the condemnation was because the vessel had an *English supercargo* on board.

By the ordinances of *France*, *Code des prises*, *vol.* 1, *p.* 306, § 9, 'all foreign vessels shall be good prize in which there shall be a *supercargo*, *commissary*, or *chief officer* of an enemy's country; or the crew of which shall be composed of one third sailors of an enemy's state; or which shall not have on board the *roles d'equipage* certified by the public officers of the neutral places from whence the vessels shall have sailed.'

And by another ordinance, 1 *Code des prises*, 303, § 6, 'No regard is to be paid to the passports granted by neutral or allied powers to the owners or masters of vessels, subjects of the enemy, if they have not been naturalized, or if they shall not have transferred their domicil to the states of the said powers three months before the 1st of *September* in the present year; nor shall the said owners and masters of vessels, subjects of the enemy, who shall have obtained such letters of naturalization, enjoy their effect, if, after they shall have obtained them, they shall return to the states of the enemy, for the purpose of there continuing their commerce;' and by the next article, 'vessels, *enemy built*, or which shall have been owned by an enemy, shall not be reputed *neutral* or *allied*, if there are not found on board authentic documents, executed before public officers who can certify their date, and prove that the sale or transfer thereof had been made to some of the subjects of an allied or neutral power, before the commencement of hostilities; and if the said deed or transfer of the property of an enemy to the subject of the neutral or ally, shall not have been duly enregistered before the principal officer of the place of departure, and signed by the owner, or the person by him authorised.' |

In violation of these ordinances, the *chief officer*, Captain *Wright*, p. 90
was a *Scot*, an enemy to *France*; for although he had a *burgher's brief*, yet it did not appear that he had resided *three months* before he obtained it; and we have before seen that a previous residence was not necessary by the laws of *Denmark* to entitle him to a burgher's brief for the purpose of being master of a vessel. In the next place, the whole number of the crew, with the Captain, being eleven, and three of the crew being *Americans* and the captain a *Scot*, more than one third of the crew were enemies of *France*. The muster roll did not describe the place of nativity of the crew. The vessel was purchased after the commencement of hostilities between *France* and the *U. S.*—And there was no authority on board from the *American* owners to *Phillips*, the agent who made the sale, in violation of the regulation of 17th *February* 1694, *Art.* 4. 2 *Code des prises*, *p.* 14, which declares 'the vessel to be good prize, if being *enemy*

built, or belonging originally to the enemy, the neutral, the allied, or the *French* proprietor, shall not be able to shew, by authentic documents *found on board*, that he had acquired his right to her before the declaration of war.'—See also 2 *Valin.* 249, § 9—251 § 12 and 244.

What chance of escape had this vessel, under all these ordinances which the *French* courts were bound to enforce? The case of *Pollard* v. *Bell*, 8 *Term*, 434, is precisely in point. The vessel in that case was *Danish*, and had all the papers usually carried by *Danish* vessels. But she was condemned in the highest court of appeal in *France* because the captain was a *Scot* who had obtained a *Danish* burgher's brief subsequent to the hostilities.

Has there, then, been no service rendered?

It is no objection to the claim of salvage that it is not made in the libel. Salvage is a condemnation of part of the thing saved. The prayer for condemnation of the whole includes the part. It may be made by petition, or even *ore tenus*.

The means used for saving need not be used with that sole view. *Talbot* v. *Seeman*. |

p. 91 As to the *quantum* of salvage, he referred to the opinion of Sir *W. Scott*, in the case of the *Sarah*. 1 *Rob.* 263.

III. But if the *Charming Betsey* is not liable to condemnation under the *non-intercourse law*, and if Captain *Murray* is not entitled to salvage, yet the restitution ought to be made of the net proceeds of the sale only, and not with damages and costs.

In maritime cases *probable cause* is always a justification. The grounds of suspicion in the present instance have been already mentioned; and when to these are added the circumstances that it was at Captain *Wright's* request that Captain *Murray* took possession of the vessel—that he consented to be carried into *Martinique*—that if he had taken out the *Frenchmen* and left the vessel in the midst of the ocean with only Captain *Wright* and his boy, they would have been left to destruction—that part of the cargo was damaged, part rifled, and all perishable—and that Captain *Murray* offered to release the vessel and cargo, on security, there can hardly be a stronger case to save him from a decree for damages.

In the case of the *Two Susannahs*, 2 *Rob.* 110, it is by Sir *W. Scott*, taken as a principle that a seizure is justified by an order for further proof, and he decreed a restitution of the proceeds only, it not being shewn that the captors *conducted themselves otherwise than with fair intentions*.

In the present case there is no pretence that Captain *Murray* did not act from the purest motives, and from a wish faithfully to execute his instructions.

Key, contra.

1. The schooner *Charming Betsey* and her cargo were neutral property, and not liable to capture under the *non-intercourse law.*

2. When recaptured she was not an *armed French vessel capable* of annoying our commerce, and therefore not liable under the acts of congress authorising the capture of such vessels. |

3. She was not in imminent danger when recaptured, and therefore p. 92
Captain *Murray* is not entitled to salvage.

4. Under all the circumstances of the case, he acted illegally, and is liable for damages which have been properly assessed.

I. As to the neutral character of the vessel and cargo, he contended,

1. That *Jared Shattuck* never was an *American* citizen.

2. That if he was, he had expatriated himself, and had become a *Danish* subject.

3. That if not a *Danish* subject, yet he was not a citizen of the *U. S.*

The evidence is that he was born in *Connecticut, but before the declaration of independence,* and was therefore a natural born subject of *Great-Britain.* He was in trade for himself in *St. Thomas's* in 1794.—This he could not do until he was 21 years of age, which will carry back the date of his birth to the year 1773. He was an apprentice at *St. Thomas's* in the year 1788 or 1789.—There is no evidence of his being in the *U. S.* since the declaration of independence. But if he had been, yet he went away while a minor, and he could not make his election during his minority. There is no evidence that his parents were citizens of the *United States.* Being a natural born subject of *Great-Britain,* he could not become a citizen of the *U. S.* unless he was here at the time of the revolution—or his parents were citizens, or unless he became naturalized according to law.

It is incumbent upon Captain *Murray* to prove him to be a citizen of the *U. S.* It is sufficient for us to shew that he was born a subject of *Great-Britain.—They* must shew how he became a citizen. This is a highly penal law, and every thing must be proved which is necessary to bring the case within the penalty.

2. But if he ever was a citizen of the *U. S.* he had expatriated himself. |

That every man has a right to expatriate himself, is admitted by p. 93
all the writers upon general law; and it is a principle peculiarly congenial to those upon which our constitutions are founded.

Some of the states of the Union have expressly recognized the right, and even prescribed the form of *expatriation.* But where the form is not prescribed, nothing more is necessary than that it be accompanied with *fairness of intention—fitness of time—and publicity of election.*

In the present instance, all these circumstances concur.

No time could have been more fit, than the year 1788 or 1789, when all *Europe* and *America* were in a state of profound peace. His country had then no claim to his service.

The *fairness of intention*, is evidenced by its having been carried into effect by an actual *bona fide* residence of 10 or 11 years—by serving an apprenticeship—by actual *domiciliation*—by marriage—by becoming a burgher—by acquiring lands—and by owning ships.

The *publicity of election*, is witnessed by the same acts, and by taking the oath of allegiance to *Denmark*.

The *United States* have prescribed no form of expatriation. All that he could do to render the act public and notorious has been done.

It is said a man cannot cease to be a citizen of one state, until he has become a citizen or subject of another. But a man may become a *citizen of the world*—an alien to all the governments on earth.[1] It is in evidence that by the laws of *Denmark*, a man cannot become a subject and carry on trade, without being naturalized—that an oath of allegiance, and an actual *domicil* are necessary to naturalization—but that
p. 94 a domicil is not necessary to | become a burgher for the purpose of navigating a *Danish* vessel.

In the two cases cited from 1 *Rob.* 133, *the Argo, and* 8 *Term Rep.* 434, *Pollard* v. *Bell*, the question was only as to the national character of the *master* of the vessel, not of the owner; and therefore they do not apply to the present case.

The burgher's brief of Captain *Wright* is dated 19th *May*, 1794, and certifies that he had taken the oath of fidelity to his *Danish* majesty, and was entitled to all the privileges of a subject.

3. But if the facts stated in the record are not sufficient to prove *Shattuck* to be a *Danish* subject, yet they do not prove him to be a citizen of the *U. S.* and if he is not a citizen of the *U. S.* it is immaterial of what country he is a subject.

By the law of nature and nations a man may, by a *bona fide* domicil, and long continued residence in a country, acquire the character of a neutral, or even of an enemy. In the case of *Scott* v. *Schwartz, Comyns' Rep.* 677, it was decided that residence in, and sailing from *Russia*, gave the mariners of a *Russian* ship, the character of *Russian* mariners, within the meaning of the *British* navigation act: and in the case of the *Harmony*, 2 *Rob.* 264, Sir *W. Scott* condemned the goods of an *American* citizen, because by a residence in *France* for four years he had acquired a domicil in that country which had given his property the character of the goods of an enemy. In the case of *Wilson* v. *Marryat*, 8 *Term*

[1] CH. J.—There can be no doubt of that.
Dallas, said he had been misunderstood. He only said that the act of becoming a citizen of another state was the most public act of expatriation and the best evidence of the fact.

Rep. 31, it was adjudged that a natural born *British* subject might acquire the character of a citizen of the *U.S.* for commercial purposes.

II. The *Charming Betsey* was not a *French* armed vessel, capable of annoying our commerce, and therefore not liable to capture or condemnation, by virtue of the limited war which existed between the *United States* and *France.*

In supporting this proposition it is not intended to interfere | with p. 95
the decision of this court in the case of *Talbot* v. *Seeman.* There is a great difference between the force of the *Amelia,* in that case, and that of the *Charming Betsey.*—The *Amelia* had eight cannon, was manned by twelve *Frenchmen,* and had been in possession of the *French* ten days, and must be admitted to have been such an armed *French* vessel as came within the meaning of the acts of congress.

But in the present case, the vessel was built at *Baltimore,* and owned by citizens of the *United States.*—When she sailed from *Baltimore* she had four cannon, a number of muskets, &c. which *Shattuck* was obliged to purchase with the vessel, and which he afterwards sold at a considerable loss.

The captain swears that at the time of recapture she had only one musket, a few balls, and twelve ounces of powder; and although *McFarlan* deposes to a greater quantity of arms, yet it appears that he did not go on board of her until eight days after the recapture.

If arms were on board, they ought to have been brought in with the vessel. This is particularly required by the act of congress. No arms are mentioned in the account of sales. It is to be presumed, as none were brought in, that none were on board. The captain expressly swears that the *French* put no force or arms on board when they took her.

She could not, therefore, be such an armed vessel as was intended by the acts of congress.

III. She was not in imminent danger when recaptured, and therefore the recaptors are not entitled to salvage.

It is a general principle that the recapture of a neutral does not entitle to salvage.

It is not intended to question the correctness of the decision of this court in the case of *Talbot* v. *Seeman,* nor that of Sir *W. Scott,* in the case of the *War Onskan.* Those cases were exceptions to the general rule, because the conduct of *France* was in violation of the law | of nations, p. 96
and because neutral vessels had no chance of escaping the rapacity of the *French* prize courts. This system of depredation upon neutral commerce continued during the years 1798 and 1799. The *Amelia* was recaptured by Captain *Talbot* in *September,* 1799, while the *arret* of 18th *January* 1798, so injurious to neutral commerce, and the violences of the prize courts were in full operation.

The *Charming Betsey* was recaptured by Captain *Murray* on the 3d of *July* 1800. During this interval great events had occurred in *France.*

On the 9th of *November* 1799, *Bonaparte* was placed at the head of the government, and a new order of things commenced.

On the 24th of *December* 1799, the *arret* of the council of five hundred of 18th *January* 1798, which made the character of neutral vessels dependent upon the quality of the cargo, and declared good prize all those laden *in whole or in part* with the productions of *England* or her possessions, was repealed, and by a new decree the ordinance of 1778 was re-established. The government adopted a more enlightened and liberal policy towards neutrals.

On the 26th of *March* 1800, a new tribunal of prizes was erected, at the head of which was placed the celebrated *Portalis*, author of the *Civil Code.*

On the 29th of *May* 1800, their principles were tested in the case of the *Pigou*, an *American* ship belonging to *Philadelphia.* This case was a public declaration to all the world that they began to entertain a proper respect for the law of nations, and from this time the rule of salvage, as established in the case of the *War Onskan*, ceased.

The *Pigou* had been condemned in an inferior tribunal.

On an appeal to the council of prizes, *Portalis*, with a degree of liberality and correctness which would confer honour upon any court
p. 97 in the world, declared that | 'excepting the case when a prize is evidently 'and actually enemy's property, all questions about the validity or 'invalidity of prizes, *come to the examination of a fact of neutrality.*' And in discussing the question as to the necessity of a *role d'equipage*, he says, 'I will begin with the principle that all questions about neu- 'trality, are what are called in law, questions *bona fide*, in which due 'regard is to be had to *facts*, and weigh them properly without adhering 'to trifling appearances.'—'But it would be a gross error in believing 'that the want of, or the least irregularity in, one of these papers, could 'operate so far as to cause the vessel to be adjudged good prize.

'Sometimes regular papers cover an enemy's property, which other 'circumstances unmask. In other circumstances the stamps of neu- 'trality break through omissions and irregularities in the forms, pro- 'ceeding from mere negligence, or grounded on motives free from fraud.

'We must speak to the point; and in these matters as well as in 'those which are to be determined, we must decide not by mere strict 'forms, *but by the principles of good faith;* we must say with the law, 'that mere omissions or mere irregularities in the forms, cannot prejudice 'the truth, if it is stated by any other ways: and *si aliquid ex solemnibus 'deficiat, cum equitas poscit, subveniendum est.*'—'The main point in

'every case is, that the judge may be satisfied that the property is 'neutral or not.' He then cited a case decided upon the 6th article of the regulation of the 21st of *October* 1744; by which article the act of throwing over papers is made a substantive ground of condemnation. But it was decided that the papers ought to be of such a nature as to prove the property to be enemy's.

The two grounds upon which the *Pigou* was condemned in the *inferior* tribunal were, that she was armed *for war*, without any commission or authority from the *U. S.* and that there was on board no *role d'equipage* attested by the public officers of the port of departure. She mounted ten guns, and was provided with muskets and other warlike stores. |

Upon the first point it was decided in the council of prizes that she p. 98
was not armed for war, but for lawful defence; and on the second that a *role d'equipage* was not absolutely necessary, if the property appeared otherwise clearly to be neutral.[1] |

[1] There is so much reason, justice and good sense appearing through a bad translation of probably, not a very accurate account of this case, that it is with pleasure transcribed as it has been published in this country from the *London* public prints.

Opinion of *Portalis*.—After having read the opinion of commissioners of the government, left in writing on the table, which is as follows:

It appears that a judgment of the tribunal of commerce at *l'Orient*, had granted Captain *Green* the replevy of his vessel and part of the goods and specie which composed the cargo; and that on the appeal entered by the comptroller of marine at *l'Orient* against that judgment, the tribunal of the department of *Morbihan* declared the vessel and cargo a good prize.

The grounds on which rested the decision of the tribunal of *Morbihan* were, that the vessel was armed for war without any commission or authorization from the *American* government; and that there was on board no role d'equipage attested by the public officers of the port of his departure.

The *captured* claim the nullity of the prize, and that the vessel be reinstated in the situation she was in when captured, and that she be delivered up as well as her cargo, and the dollars which were on board, and also the papers, with damages and interest adequate to the losses they had sustained.

To be able to determine on the respective demands, we must first fix upon the validity or invalidity of the prize, *excepting the case when a prize is evidently and actually enemy's property, all questions about the validity or invalidity of prizes come to the examination of a fact of neutrality.*

In this case, was the tribunal of *Morbihan* authorised to determine that the ship *Pigou* was in such circumstances as to be prevented from being acknowledged and respected as neutral?

It is said the vessel was armed for war, and without any authorization from her government; that she mounted 10 guns of different rates, and that muskets and warlike stores have been found in her.

The captured reply, that the vessel being bound to *India*, was armed for her own defence, and that the warlike ammunition, the muskets and guns, did not exceed what is usual to have on board for long voyages; for my part, *I think it is not for having arms on board only, that a vessel can be said to be armed for war.* The warlike armament is merely of an offensive nature; it is deemed so when there is no other end than attacking, or at least when every thing shows that attack is the main point of the armament: then a vessel is reputed inimical, or pirate if she has no commission or papers which may remove the suspicion. But defence is of natural right, and every means of defence is lawful in voyages at sea, as in every other dangerous occurrence of life.

A vessel consisting but of a small crew, and whose cargo in goods amounted to

p. 99 In another case (*the Statira*) which was decided very shortly after
p. 100 that of the *Pigou*, by the same council | of prizes, two questions arose—
1st, whether the *Statira*, being an *American* vessel captured by a *British*
p. 101 ship and | recaptured by a *French* privateer, was liable to confiscation on

a considerable sum, was evidently intended for trade, and not for war. The arms found on board were not to commit plunder and hostility, but to avoid them ; not for attack, but for defence. The pretence of armament for war, in my opinion, cannot be founded.

I am now to discuss the second argument against the captors on the want of a *role d'equipage*, attested by the public officers of the place of her departure.

To support the validity of the prize, they allege the regulation of the *21st October* 1774, *of the 26th of July* 1778, and the decree of the directory of the *12th Ventose, 5th year*, which require a *role d'equipage*.

The captured, on their part, claim the execution of the treaty of commerce, between *France* and the *United States* of *America*, of the *6th February* 1778 ; they contend that general regulations could not derogate from a special treaty, and that the directory could not infringe the treaty by an arbitrary decree.

It is a fact that the regulations of 1774 and 1778, and the decree of the directory require a *role d'equipage* asserted by the public officers of the place of departure. It is also a fact, that the *role d'equipage* is not mentioned in the treaty of the 6th *February*, as one of the papers requisite to establish neutrality, but I believe I am not under the necessity of discussing whether the treaty is superior to the regulations, or whether the regulations are superior to the treaty.

I will begin with the principle that all questions about neutrality, are what are called in law, questions BONA FIDE, in which due regard is to be had to facts which are to be properly weighed, without adhering to trifling appearances.

Neutrality is to be proved ; for this reason, the *regulation of marine of* 1681, *article* 9, on prizes, states, that vessels with their cargoes, which shall not have on board charter parties, bills of lading, nor invoices, shall be considered as good prize.

From the same motives, the *regulations of* 1774 and 1778, put the commanders of neutral vessels under obligation of proving at sea their property being neutral, by passports, bills of lading, invoices and vessels' papers.

The regulation of 1774, whose enacting parts have been renewed by the directory, literally expresses, among the papers requisite to prove neutral property, that there must be a *role d'equipage* in due form.

But it would be a gross error to suppose that the want of, or the least irregularity in, one of these papers, could operate so far as to cause the vessel to be adjudged good prize.

Sometimes regular papers cover an enemy's property, which other circumstances unmask. In other circumstances the stamps of neutrality break through omissions and irregularities in the forms, proceeding from mere negligence, or grounded on motives free from fraud.

We must speak to the point, and in these matters as well as in those which are to be determined, we must decide not by mere strict forms, but by the principles of good faith ; we must say with the law, that mere omissions, or mere irregularities in the forms, cannot prejudice the truth, if it is stated by any other ways : and *si aliquid ex solemnibus deficiat, cum equitas poscit, subveniendum est.*

Therefore, *the regulation of the 26th July*, 1778, *art.* 2, after having stated that the masters of neutral vessels shall prove at sea their property being neutral, by passports, bills of lading, invoices and other vessel-papers, adds, *one of which at least* shall establish the property being neutral, or shall contain an exact description of it.

It is not then necessary in every case to prove the property neutral by the simultaneous concurrence of all the papers enumerated in the regulations. But it is sufficient according to the circumstances, that *one* of these papers establish the property, if it is not opposed or destroyed by more peremptory circumstances.

The main point in every case is, that the judge may be satisfied that the property is neutral or not.

We have a precedent of what I assert in art. 6, of the regulation of the 21st October 1774 ; by that article every vessel belonging to what nation soever, neutral, enemy or ally, from which papers shall be proved to have been thrown overboard,

the ground of her being in the hands of an enemy; and 2d, whether her cargo was ground of condemnation?

On the *first point* it was held, that the mere capture does not before condemnation, vest the property in the *captor*, so as to make it transferable to the *recaptor*, and therefore no ground of confiscation.

shall be adjudged good prize, on the proof only of the papers having been thrown overboard; nothing can be more explicit.

Some difficulties arose on the execution of that severe clause of the law, which has been renewed by the regulation of 1778.

On the 13th *November* 1779, the king wrote to the admiral, that he left entirely to him and to the commissioners of the council of prizes to apply the rigidity of the decree, and of the regulation of the 26th *July*, or to moderate their clauses as peculiar circumstances would require it in their opinion.

A judgment of the council of the 27th *December*, in the said year, rendered between *Pierre Brandebourg*, master of the *Swedish* ship *Fortune* and *M. de la Rogredourden*, captain of the king's xebec the *Fox*, liberated the said vessel notwithstanding some papers had been thrown overboard. It was determined that to ground an adjudication of the vessel on the papers being thrown overboard, *they ought to be of such nature as to prove the property enemy's*, and that the captain ought to have had a concern in throwing his papers overboard; which was not the case with the *Swedish* captain.

In this case without discussing whether *American* captains are obliged or not to exhibit a *role d'equipage*, attested by the public officers of the place of their departure, I observe that this *role* is supplied by the *passport*, and that the captured allege the impossibility for them to have their *role d'equipage* attested by public officers in *Philadelphia*, since the intercourse was forbidden, under pain of death, with *Philadelphia*, where a most tremendous epidemic was raging: I must add, that the passport, the invoice, and all the vessel's papers, establish evidently the property of the vessel and cargo being neutral; none of these papers have ever been disputed. Thus the invalidity of the capture is obvious; whence it follows that every thing which has been taken from them, ought to be restored in kind or by a just indemnification.

As to their claim for damages and interest, I must observe, that such a claim is not in every case the sequel of the invalidity of the capture.

Suspicious proceedings of the captured, may occasion the mistake of the captors. But when the injustice on the part of the captors cannot be excused, the captured have a right to damages and interest.

Let us apply these principles to the cause. Could the captors entertain any grounded suspicions against the captain of the ship *Pigou?* was not the neutrality of the ship proved by her being an *American* built ship, by her flag, by her destination, by the crew being composed of *Americans*, by her cargo consisting of *American* goods, without any contraband articles, by the name and the character of Captain *Green*, very well known by services he rendered to the *French* nation, by the register, the passport, the invoice, by the papers on board, finally, by the place where she was captured, which was far from any suspicious destination? It was then impossible for the captors to make any mistake; the vessel struck her colors at the first summons, the officers and crew made faithful declarations, they answered plainly in their examination; no pretence whatever was left to the captors; they don't appear to have observed the forms prescribed by the regulation. Some very heavy charges are uttered against them; but I think it is not time yet to take notice of them; they will be discussed when the articles captured are restored.

In these circumstances I am of opinion, that a more absolute and full replevy be granted to Captain *Green* of the *American* ship *Pigou*, and her cargo, as well as the papers found on board; as to the claim of damages and interest, made by Captain *Green*, that the former be granted to him, and they shall be settled by arbitrators in the usual form.

(Signed) PORTALIS.

Paris, 6 Prairial, 8th year.

The council declare that the capture of the ship *Pigou* and her cargo, is null and of no effect; therefore, grant a full and absolute replevy of the vessel, rigging and apparel, together with the papers and cargo, to Captain *John Green;* as to the

On the 2d there were two inquiries. 1st, whether, in point of law, the character of the vessel, neutral or not, should be determined by the nature of the cargo? 2d, whether the cargo consisted of contraband?

As to the first, the commissary (*Portalis,*) reviews the laws upon this subject prior to the *arret of the council of* 500, *of the 29th Nivose,*
p. 102 *year* 6, (*January* 18, 1798,) | the severity of which he condemns; but as the *Statira* was captured while it was in force, the captor was entitled to have the capture tried by it. He observes that such regulations are improperly styled *laws,* and they are essentially variable *pro temporibus et causis;* that they should always be tempered by wisdom and equity. He adverts to the words *in whole, or in part,* by which he says ought to be understood *a great part,* according to the judicial maxim *parum pro nihilo habetur.* Upon this principle he is of opinion, that a ship ought not to be subject to confiscation, even under the law of *the 29th Nivose,* unless such a part of the cargo comes under the description of what is there made contraband, *as ought to excite a presumption of fraud against all the rest.*

The question of *contraband,* related to 40 barrels of *pitch,* part of the cargo of the *Statira.* He observed that pitch was not made contraband by the treaty of 1778, but as *France* was by that treaty, entitled to all the advantages of the most favored nation, and as by a subsequent treaty between the *United States* and *Great Britain,* pitch was among the enumerated articles of contraband, it necessarily became such in regard to *France.*

He however decides the quantity to be too small to justify condemnation, even upon the principle of the law of 24th, (*quere 29th*) *Nivose.* And the ship was restored.[1] |

damages and interest claimed by Captain *Green,* the council grant them to him, and they shall be settled by arbitrators in the usual forms.

DONE at *Paris* on the 9th *Prairial,* 8th year of the Republic.

Present,

Citizen Presidents REDON, NIOU CANTE, MOREAU, MONTIGNY, MONPLACID, BARENNES, DUSAUB, PAREVAL, GRANDMAISON, TOURNACHER.

[1] The following account of the case of *the Statira* is extracted from *London* papers of *June* 1800.

We stated to our readers some time ago the principles upon which the new council of prizes at *Paris* proceeded with respect to neutral vessels, and we gave the decision at length upon the *American* ship *Pigou,* which was ordered to be restored with costs. That decision shewed, that a greater degree of system had been established, and that the loose and frequently unjust principles upon which the directory acted with respect to captures of neutral ships, were meant to be abandoned. The following is the decision of the council on another case, that of the *Statira*:

These cases are read to show that *France* had abstained from those p. 103
violations of the law of nations, which had | caused the rule in the case p. 104

The *Statira*, captain *Seaward*, an *American* ship, had been captured by an *English* vessel, and recaptured by the *French* privateer the *Hazard*.

The first point which the commissary considers is, the effect which the *Statira* having been in the possession of the *English* ought to have.

He observes, that if the vessel captured and recovered had been *French*, and recaptured by a national vessel, there would have been nothing due to the re-captor, because this is only the exercise of that protection which the state owes to all its subjects in all circumstances. If it had been recaptured by a privateer, the *French* regulation gives the property of the vessel to the recaptor, on account of the risk and danger of privateering. It might be an act of generosity to restore the vessel to the original owner, but it is not of right that it should.

In the next place, he considers the case of a neutral recaptured from the enemy. If really neutral, he says the vessel must be released. The ground of this higher degree of favor for a neutral he states to be, that the *French* vessel must have been lost in the country. But it is not certain that the neutral captured by an enemy may not be released by the admiralty courts of the enemy. The mere capture does not vest the property immediately in the captor, so as to make it transferable to the recaptor. The commissary considers the property not vested in the captor till sentence of condemnation.

We believe this is much milder, and more favorable for neutrals than our practice. The being a certain time in the enemy's custody, or *intra mœnia*, transfers the property to the captor. This was held in the late well known case of the *Spanish* prize, captured by the *French*, and recaptured by the *English*. It is to be observed, however, that a principle of reciprocity is pursued, and that we give the same indulgence to the neutral which they would have given us in a similar case.

Having proved that the *Statira* was not liable to confiscation, on the ground of her being in the hands of an enemy, the commissary considers whether her cargo was ground of confiscation.

Upon this point he considers two questions, 1st, whether in point of law, the character of the vessel, neutral or not, should be determined by the nature of the cargo ? 2d, whether the cargo consisted of contraband ?

He then reviews all the laws upon this head. He shews that till the decree of the 29th *Nivose*, (year 6) *January* 18, 1798, the regulation states, 'His majesty prohibits all privateers to stop and bring into the ports of the kingdom the ships of neutral powers, even though coming from or bound to the ports of the enemy, with the exception of those carrying supplies to places blockaded, invested or besieged. With regard to the ships of neutral states laden with contraband commodities for the enemy, they may be stopped and the said commodities shall be seized and confiscated, but the vessels and the residue of their cargo shall be restored, unless the said contraband commodities constituted three-fourths of the value of the cargo, in which case the ship and cargo shall be wholly confiscated. His majesty however reserves the right of revoking the privileges above granted, if the enemy do not grant a reciprocal indulgence in the course of six months from the date hereof.

The law of the 29th *Nivose*, (year 6) overturned all this system, and enacted, 'That the state of ships in regard to their being neutral or hostile, should be determined by their cargo ; that accordingly every vessel found at sea, laden in whole or in part with commodities coming from England or its possessions, should be declared good prize, whoever might be owners of their articles and commodities.'

The severity of this regulation the commissary condemns, but as the *Statira* was captured while it was in force, the captor was entitled to have the capture tried by it.

He examines next how the regulation applies, premising his opinion that such regulations are improperly stiled *laws*, and they are essentially variable *pro temporibus et causis ;* that they should always be tempered by wisdom and equity. He adverts to the words in whole or in part. By the whole, he says, ought to be understood a great part, according to the judicial maxim *parum pro nihilo habetur*. Upon this principle then, he is of opinion that a ship ought not to be subject to confiscation even under the law of the 29th *Nivose*, unless such a part of the cargo comes under the description of what is there made contraband, as ought to excite a presumption of fraud against all the rest. What that part should be is not capable of definition, but should be left to the enlightened equity and sound discretion of the judge.

of the *War Onskan ;* and to bring the present case within the principles established by the court in the case of *Talbot* v. *Seeman.* |

p. 105 The general conduct of *France* having been changed, it is to be presumed, she would have been released with damages and costs ; if not upon the principles of justice, good faith, and the law of nations, yet upon those of policy. *France* was at war with *Great Britain ;* partial hostilities existed with the *United States.* The non-intercourse law prevented our vessels from trading with *France* or her dependencies ; and the *French West-Indies* could only be supplied from the *Danish* islands. It is not to be believed, therefore, that they would, by condemning this vessel, (coming to them with those very supplies which they wanted,) embarrass a trade so necessary to their very existence.

But independent of the general misconduct of *France* towards neutrals, the captors rely upon three points arising under *French* ordinances.

1. That the *Role d'Equipage* wants the place of nativity of the crew. But according to the opinion of *Portalis,* this is not a fatal defect, nor is it, of itself, a sufficient ground of condemnation. |

p. 106 2. That more than one third of the crew were enemies of *France.* The word *matelot* in the ordinance of 1778, means a *sailor,* in contradistinction to the captain or master. Exclude the captain and there were only 10 persons on board, and only three of those are pretended to be enemies ; so that one third were not enemies within the meaning of the ordinance.

But these three pretended enemies were *Americans.* The hostilities which existed between *France* and the *United States,* amounted at most to a partial, limited war, according to the decision of this court in the

The *Statira* had on board sixty barrels of turpentine and forty barrels of pitch. The captor contended that these were contraband ; the captured said, that by the treaty of 1778 with the Americans, they were not enumerated as contraband.

But the commissary shews, that the Americans by the treaty were bound to admit the French to all the advantages of the most favourite nations ; that having, in a subsequent treaty with England, made *pitch* contraband, with respect to the latter, necessarily it became contraband with regard to France.

The learned commissary, however, thinks that even upon the principle of the law of the 24th *Nivose,* the quantity of pitch was too small to justify confiscation.

In the next place the captor alleged, that 2911 pieces of Campeachy wood, part of the cargo of the *Statira,* was the produce of *English* possessions.

This point however had not been regularly ascertained, as the report on the subject was made without the captured being called as a party.

The commissary states, however, strong circumstances of suspicion on this head. The captured had not appealed against the confiscation of the cargo. The point came under the consideration of the court on the appeal of the captor, who wanted to get both ship and cargo.

The commissary therefore saw no reason for condemning the ship, which was clearly neutral ; but on account of the suspicions against the character of the cargo, he thought no indemnification whatever was due to the captured.

Judgment was pronounced accordingly.

The piratical decree of the 29th *Nivose,* (year 6) mentioned above with so much severity by *Portalis,* has been repealed, and things have been placed upon the footing of the regulation of 1778 ; that is, the *French* are to treat neutrals in regard to contraband in the same way in which they are treated by us ; they will not allow the *Americans* to carry into *England* a commodity which the *English* would seize as contraband going into the ports of *France.*

case of *Bas* v. *Tingy*. It was only a war against *French* armed force found on the high seas.

It did not authorise private hostilities between the citizens of the two countries. Individuals are only enemies to each other in a *general* war. The war extended only to those objects pointed out in the acts of Congress; as to every thing else, the state of the two nations was to be considered as a state of peace. It was a war only *quoad hoc*. The individuals of the two nations were always neutral to each other. A citizen of the *United States* could only be considered an enemy of *France* while in arms against her; the neutrality was the counterpart, or (to use a mathematical expression) the complement of the war. A citizen of the *United States*, peaceably navigating a neutral vessel, could not be burthened with the character of enemy.

3. The captain was a *Scot* by birth.

The ordinance cited from 1 *Code des prises*, 303. § 6. in support of this objection, is in the alternative. The master of the vessel must be naturalized in a neutral country, *or* must have transferred his domicil to the neutral country three months before the first of September in *that year*. Naturalization is not necessary, if there be such a transfer of the domicil; and the domicil is not necessary if the party be naturalized.

But the authority of *Portalis* shows that these decrees are not to be considered as *laws* but *sub modo*. |

They are only regulations made at particular times, for particular p. 107
purposes.

If the same evidence had been produced at *Guadaloupe* which has been brought here, (and the same would have been more easily obtained there) there can be no doubt the vessel would have been restored.

It is in evidence that other vessels of Mr. *Shattuck* had been released.

No salvage can be allowed unless the danger was imminent, not problematical.

IV. Under all the circumstances of the case, Captain *Murray* acted illegally, and is liable for damages; which have been properly assessed.

His subsequent conduct rendered the transaction tortious *ab initio*. If he was justified in rescuing the vessel from the hands of the *French*, his subsequent detention of the vessel, and the sale of the cargo at *Martinique* by his own agent, without condemnation, were unauthorised acts in violation of the rights of neutrality.

The libel says nothing of the cargo. It is first mentioned in the replication. The libel only prays condemnation of the vessel, on the ground of violation of the non-intercourse law.

By law he was bound to bring the vessel and cargo into a port of the *United States* for adjudication, and had no authority to sell the

cargo before condemnation.—As to the pretence of her being an armed *French* vessel, he ought to have sent the arms into port with the vessel as the only evidence of their existence.

The commander of the *French* privateer, in his commission to the prize-master, calls her the *Danish* schooner *Charming Betsy, William Wright,* master.

There was no evidence to impeach the credence due to the papers
p. 108 found on board of her, and which at that | time had every appearance of fairness, and which have since been incontestibly proved to be genuine.

The facts stated in the *proces verbal,* are that she had no log-book—that the mate declared himself to be an *American*—that the flag and pendant were *American*—that the *Danish* flag had been made during the chase, which was confirmed by the two boys—and that she had no pass from the *French* consul. Whatever weight might be given to these facts, if true, yet the outrageous and disorderly conduct of the crew of the privateer, entirely destroys the credit of the *proces verbal,* and at best it would be only the declaration of interested plunderers.

But it is said that, by the law of nations, probable cause is a sufficient excuse ; and that this law operates as the law of nations.

In revenue laws, probable cause is no justification, unless it is made so by the laws themselves.

This is not a war measure. If the *United States* were at war it was unnecessary, because the act of trading with an enemy is itself a ground of condemnation. This law was passed because the *United States* were *not* at war, and wished to avoid it, by shewing their power over the *French* colonies in the *West-Indies.* It is a municipal regulation, as well suited to a state of peace as of war. It affects our own citizens only. It is no part of the law of nations. What would other nations call it, were they bound to notice it ? It can give no right to search and seize neutrals. It could not affect their rights.

He who takes must take at his peril. The law only gives authority to seize vessels of the *United States.* If he takes the vessel of another nation, he must answer it.

As to the damages. Nothing can justify Captain *Murray ;* but it was a mistake of the head, not of the heart. His intentions were honest and correct, but he suffered his suspicions to carry him too far. If it was an error in judgment, shall he have salvage ? If an injury has
p. 109 been done to the innocent and unfortunate | owner, shall he have no redress ? The consequences to him were the same, whatever might have been the motive. The damages have been properly assessed in the District Court. If damages are to be given they ought not to be less than the original cost of vessel and cargo, with the outfit, insurance,

interest and expenses; and upon calculation it will be found that the damages assessed do not exceed the amount of these.[1]

Dallas. It is said that Mr. *Shattuck* never was a citizen of the *United States.*

What is averred and admitted need not be proved.

Mr. *Soderstrom,* in his rejoinder, expressly admits that he was once a citizen of the *United States* by alleging that he had transferred his allegiance from the government of the *United States* to his *Danish* majesty.

Mr. *Shattuck's* burgher's brief, is at length, for the first time, produced and admitted to be made a part of the record. It bears date on the 10th of April, 1797. It may here be remarked that some of the witnesses have testified that he became a burgher in 1795. This shews how little reliance ought to be placed upon their testimony. If then Mr. *Shattuck* did expatriate himself, it was not until *April* 1797. It has been conceded, that a man cannot expatriate himself unless it be done in a *fit time,* with *fairness of intention,* and *publicity of act.*

As to the fitness of the time. What was the situation of this country and *France* in the year 1797.

In 1795 the *British* treaty had excited the jealousy of *France.* In 1796 she passed several edicts highly injurious to our commerce. Mr. *Pinckney* had been sent as an Envoy extraordinary, and was refused. *France* had gone on in a long course of injury and insult, which at length roused the spirit of the nation. On the 14th of *June* 1797, the p. 110
act of Congress was passed, prohibiting the exportation of arms—On the 23d, the act for the defence of the ports and harbours of the *United States*—On the 24th, the act for raising 80,000 militia—On the 1st of *July,* the act providing a naval armament—On the 13th of *June* 1798, the first *non-intercourse* bill was passed, and on the 7th of *July* the treaties with *France* were annulled.

These facts shew that the time when Mr. *Shattuck* chose to expatriate himself, was a time of *approaching hostilities,* and when every thing indicated *war.*

As to the *fairness of his intention.* The same facts shew what that intention was. It was to carry on that trade which every thing tended to shew would soon become criminal by the laws of war, and from the exercise of which the other citizens of the *United States* were about to be interdicted.

The act of Congress points to this very case. It was to prevent transactions of this nature, that the word '*elsewhere*' was inserted.

[1] *Marshal, Ch. J.* What would have been the law as to *probable cause,* if there had been a public general war between France and the United States, and the vessel had been taken on suspicion of being a vessel of the United States, trading with the enemy, contrary to the laws of war? Would *probable cause* excuse, in such a case, if it should turn out that she was a neutral?

But why was not this burgher's brief, or a copy of it, put on board the vessel? The answer is obvious—because it would have discovered the *time* of expatriation, which would have increased the suspicions excited by the origin of the vessel, by the recent transfer, by the nature of the cargo, and by the character of the crew.

Domicil in a neutral country gives a man only the rights of trade: it will not justify him in a violation of the laws of his country.

If then Mr. *Shattuck* could not expatriate himself, or if he has not expatriated himself, he is bound to obey the laws of the *United States*. A nation has a right to bind, by her laws, her own citizens residing in a foreign country; as the *United States* have done in the act of Congress respecting the slave trade, and in the *non-intercourse* law.

The question, whether the vessel was capable of annoying our com-
p. 111 merce, depends upon matter of fact, of which | the court will judge. The number of men was sufficient; the testimony respecting the cutlasses is supported by the nature of the transaction and by the usage in such cases. Some arms were necessary to prevent Capt. *Wright* and his boys from rising and rescuing the vessel. Circumstances are as strong as oaths, and are generally more satisfactory.

The vessel, having port-holes, was constructed for war, and in an hour after her arrival at Guadaloupe might have been completely equipped. Upon the principles of the case of *Talbot v. Seeman*, Captain *Murray* was bound to guard against this, and he would have been culpable if he had suffered her to escape.

But it is said that she was not in danger of condemnation by the *French*, because *France* had ceased from her violation of the laws of nations, because she had repealed the obnoxious arret of 18th *January* 1798, and because one third of the crew were not her enemies. Admitting all this, yet if one ground of condemnation remained, she would have been condemned. The vessel was transferred from an enemy, to a neutral, during the heat of hostilities. This alone was a sufficient ground of condemnation under the ordinance already cited from 1. *Code des prises*, 304. Art. 7. In the case of *Talbot v. Seeman*, the ground of salvage was, that the vessel was liable to condemnation under a *French arret*—And that the courts of *France* were bound to carry the arret into effect.

The conduct of Captain *Murray* was not illegal. He was bound by law, as well as by his instructions, to take the vessel out of the hands of the *French*. It was with the consent, if not at the request, of Captain *Wright*; and it was in itself an act of humanity. His conduct was fair, upright, and honorable in the whole transaction. He offered to take security for the vessel and cargo. The cargo was perishable; if it had been brought to the *United States* it would not have been in a merchantable condition; or if it had been, it would not have sold so high here

(being chiefly articles of *American* produce) as at *Martinique*. The sale was fair and the proceeds brought to the *United States* to wait the event of the trial.

Probable cause is a thing of maritime jurisdiction; and authorities in point may be found even at common law. |

If it is a municipal regulation, it is one which affects the whole world. p. 112
It is engrafted upon the law of nations. It is municipal only as it emanates from the municipal authority of the nation. But the whole world is bound to notice a law which affects the interests of all nations in the world.

As to the damages; the principles upon which they are assessed do not appear from the report of the assessors, but the probability is that they were founded upon the estimates of the probable profits of the voyage, as stated in the testimony of some of the witnesses. In a case of this kind, where the purity of intention is admitted, it can never be proper to give *speculative* or *vindictive* damages.[1]

Martin, in reply.

1. As to the national character of *Shattuck*.

He was born before the revolution; probably in 1773 or 1774; at least 21 years before *April* 10th 1797, which will bring it before the declaration of independence.

In *Duane's* case, it was decided that even if it had been proved that he was born in *New-York*, yet his birth being before the revolution, and having been carried to Ireland during his minority, he was an alien.

The rejoinder of Mr. *Soderstrom* does not admit the fact, that *Shattuck* was a citizen of the *United States;* but if it did, it is coupled with an express allegation that he had duly expatriated himself; and if part is taken, the whole must be taken. The words of the rejoinder are, 'and 'this party expressly alleges and avers that the said *Jared Shattuck*, 'at the several times and periods above mentioned, and long before, and 'in the intermediate times which elapsed between the said several times 'or periods, had been, then was, ever since hath been, and now is, a 'subject of his majesty the king of *Denmark*, owing allegiance to his | 'said majesty, and to no other prince, potentate, state or sovereignty p. 113
'whatever; and that he the said *Jared Shattuck* had, long before his 'said purchase of the said schooner, *duly expatriated* himself from the 'dominions of the *United States*, to those of his said majesty; and 'transferred his allegiance and subjection from the said *United States* 'and their government, to his said majesty and his government.' The whole purport of which is, that if he was ever a citizen of the *United States* he had expatriated himself.

[1] In answer to an inquiry by the *Chief Justice* for authorities to support the position that probable cause is always a justification in maritime cases, Mr. *Dallas* referred *generally* to *Brown's Civil and Admiralty Law*, and to the *decisions of Sir Wm. Scott.*

Even if it was an admission of the fact, yet it could not prejudice Mr. *Shattuck*, as the rejoinder is by Mr. *Soderstrom* in character of Consul of *Denmark*, and as the representative of the nation.

If he was born before the revolution he never owed natural allegiance to the *United States*; and if he remained here after the revolution, during part of his minority, he owed only a temporary and local allegiance; during the existence of which, if he had taken up arms against the *United States*, he would have been guilty of treason; but that allegiance continued only while he was a resident of the country; he had a right to transfer such temporary allegiance whenever he pleased. *Foster Cr. Law*, 183. 185.

That he acted with a fair and honest intention is proved by his *bona fide* residence and domicil for 10 or 11 years. 2. *Brown's Civil and Admiralty Law*, 328.

The navigation act of Great Britain is a municipal law, and yet a *bona fide* domicil and residence of foreigners were held sufficient to bring the persons within its provisions. *Comyns' Rep.* 677. *Scott qui tam* v. *Schwartz*.[1] |

p. 114 But a stronger case than that is found in 1 *Bos. & Pul.* 430. *Marryatt v. Wilson*, in the Exchequer chamber, on a writ of error from the King's bench.

In that case a natural born *British* subject, naturalized in the *United States* since the peace, was adjudged to be a citizen of the *United States* within the treaty, and navigation acts of *Great Britain*, so as to carry on a direct trade from *England* to the *British East-Indies*.

The opinion of *Eyre Ch. J.* beginning in p. 439, is very strong in our favour.

There is no probability that the vessel would have been condemned at Guadaloupe. Mr. *Shattuck*, and his course of trade, were well known there, and they had already released some of his vessels. Another reason is, that Bonaparte was at that time negotiating with the northern

[1] The case of *Scott v. Schwartz*, was an information against the Russian ship *The Constant*, because the master and three fourths of the mariners were not of that *country or place*, according to the *Statute of* 12. *Car.* 2. *c.* 18. § 8. The ship was built in Russia, and the cargo was the product of that country. The master was born out of the Russian dominions, but in 1733 was admitted, and ever since continued a burgher of *Riga*; and had been a resident there, when not engaged in foreign voyages, and traded from thence, 9 years before the seizure. There were only 11 mariners on board, of whom 4 were born in *Russia*; *Morgan* a fifth was born in *Ireland* and there bound apprentice to the master, and as such went with him to *Riga*, and for three or four years before the seizure, served on board the same ship and sailed therein from *Riga*, on this and former voyages. The other 6 were born out of the dominions of *Russia*, but *Stephen Hanson*, one of them, had resided at *Riga* 8 years next before the seizure—*Hans Yasper* 5 years—*Rein Steingrave* 4 years, and *Derrick Andrews*, the cook, 7 years, and these 4, during those years had sailed from *Riga* in that and other vessels.

It was adjudged that these people were of that *country or place*, within the meaning of the Statute, and the vessel properly manned and navigated.

powers of Europe, to form a coalition to support the principle that free ships should make free goods; and he would have succeeded, but for the *able negotiations of Lord Nelson at Copenhagen.*

In *Park on Insurance*, 363, it is said, 'If the ground of decision 'appear to be, not on the want of neutrality, but upon a foreign ordinance 'manifestly unjust, and contrary to the law of nations, and the insured 'has only infringed such a partial law; as the condemnation did not 'proceed on the point of neutrality, it cannot apply to the warranty, 'so as to discharge the insurer.' And in support of this position he cites the case of *Mayne v. Walter.*

There is no ordinance of *France*, which, upon the principles established in the case of the *Pigou*, would have been a sufficient ground of condemnation. |

The circumstances required by those ordinances are only evidence p. 115
of neutrality, which is always a question of *bona fide.* A condemnation upon either of these ordinances alone would have been contrary to the law of nations; but if they are considered as only requiring certain circumstances tending to establish the fact of neutrality, they are perfectly consistent with that law. This is the light in which they have been considered by *Portalis.*

The *French* have never considered our vessels as the vessels of an enemy. Our vessels have not been condemned by them as enemy-property; but their sentences have always been grounded upon a pretended violation of some particular ordinance of *France.* Hence it appears that they would not have considered an *American* vessel, sold to a Dane, as an enemy's vessel transferred to a neutral during a state of war.

But the claim of salvage is an after thought. It was not necessary to bring her to the *United States* to obtain salvage. Salvage is a question of the law of nations, and may be decided by the courts of any civilized nation. Instead of rendering a service, he has done a tenfold injury. Captain *Murray's* intentions were undoubtedly correct and honourable, and we do not wish *vindictive* damages; but Mr. *Shattuck* will be a loser, even if he gains his cause, and recovers the damages already assessed.

Probable cause cannot justify the taking and bringing in a neutral; but it may prevent vindictive damages.

Feb. 22d. Marshall, Chief Justice, delivered the opinion of the court:—The *Charming Betsy* was an *American* built vessel, belonging to citizens of the *United States*, and sailed from *Baltimore*, under the name of the *Jane*, on the 10th of *April*, 1800, with a cargo of flour for *St. Bartholomew's;* she was sent out for the purpose of being sold. The cargo was disposed of at *St. Bartholomew's;* but finding it impossible to sell the vessel at that place, the captain proceeded with her to the

island of *St. Thomas*, where she was disposed of to *Jared Shattuck*, who
p. 116 changed her name to that of the *Charming Betsy*, and | having put on board her a cargo consisting of *American* produce, cleared her out as a *Danish* vessel for the island of *Guadaloupe*.

On her voyage she was captured by a *French* privateer, and eight hands were put on board her for the purpose of taking her into *Guadaloupe* as a prize. She was afterwards recaptured by captain *Murray*, commander of the *Constellation* frigate, and carried into *Martinique*. It appears that the captain of the *Charming Betsy* was not willing to be taken into that island ; but when there, he claimed to have his vessel and cargo restored, as being the property of *Jared Shattuck*, a *Danish* burgher.

Jared Shattuck was born in the *United States*, but had removed to the island of *St. Thomas* while an infant, and was proved to have resided there ever since the year 1789 or 1790. He had been accustomed to carry on trade as a *Danish* subject, had married a wife and acquired real property in the island, and also taken the oath of allegiance to the crown of *Denmark* in 1797.

Considering him as an *American* citizen who was violating the law prohibiting all intercourse between the *United States* and *France* or its dependencies, or the sale of the vessel as a mere cover to evade that law, captain *Murray* sold the cargo of the *Charming Betsy*, which consisted of *American* produce, in *Martinique*, and brought the vessel into the port of *Philadelphia*, where she was libelled under what is termed the non-intercourse law. The vessel and cargo were claimed by the consul of *Denmark* as being the *bona fide* property of a *Danish* subject.

This cause came on to be heard before the judge for the district of *Pennsylvania*, who declared the seizure to be illegal, and that the vessel ought to be restored and the proceeds of the cargo paid to the claimant or his lawful agent, together with costs and such damages as should be assessed by the clerk of the court, who was directed to inquire into and report the amount thereof ; for which purpose he was also directed to associate with himself two intelligent merchants of the district, and duly inquire what damage *Jared Shattuck* had sustained by reason of
p. 117 the premises. If they should be of opinion that the | officers of the *Constellation* had conferred any benefit on the owner of the *Charming Betsy* by rescuing her out of the hands of the *French* captors, they were in the adjustment to allow reasonable compensation for the service.

In pursuance of this order the clerk associated with himself two merchants, and reported, that having examined the proofs and vouchers exhibited in the cause, they were of opinion that the owner of the vessel and cargo had sustained damage to the amount of 20,594 dollars and 16 cents, from which is to be deducted the sum of 4,363 dollars and

86 cents, the amount of monies paid into court arising from the sales of the cargo, and the further sum of 1,300 dollars, being the residue of the proceeds of the said sales remaining to be brought into court, 5,663 dollars and 86 cents. This estimate is exclusive of the value of the vessel, which was fixed at 3,000 dollars.

To this report an account is annexed, in which the damages, without particularizing the items on which the estimate was formed, were stated at 14,930 dollars and 30 cents.

No exceptions having been taken to this report, it was confirmed, and by the final sentence of the court captain *Murray* was ordered to pay the amount thereof.

From this decree an appeal was prayed to the circuit court, where the decree was affirmed so far as it directed restitution of the vessel and payment to the claimant of the net proceeds of the sale of the cargo in *Martinique*, and reversed for the residue.

From this decree each party has appealed to this court.

It is contended on the part of the captors in substance,

1st. That the vessel *Charming Betsy* and cargo are confiscable under the laws of the *United States*. If not so,

2d. That the captors are entitled to salvage. If this is against them,

3d. That they ought to be excused from damages, | because there was p. 118
probable cause for seizing the vessel and bringing her into port.

1st. Is the *Charming Betsy* subject to seizure and condemnation for having violated a law of the *United States*?

The libel claims this forfeiture under the act passed in *February*, 1800, further to suspend the commercial intercourse between the *United States* and *France* and the dependencies thereof.

That act declares 'that all commercial intercourse,' &c. It has been very properly observed, in argument, that the building of vessels in the *United States* for sale to neutrals, in the islands, is, during war, a profitable business, which Congress cannot be intended to have prohibited, unless that intent be manifested by express words or a very plain and necessary implication.

It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.

These principles are believed to be correct, and they ought to be kept in view in construing the act now under consideration.

The first sentence of the act which describes the persons whose commercial intercourse with *France* or her dependencies is to be prohibited, names any person or persons, resident within the *United States* or under

their protection. Commerce carried on by persons within this description is declared to be illicit.

From persons the act proceeds to things, and declares explicitly the cases in which the vessels employed in this illicit commerce shall be forfeited. Any vessel owned, hired or employed wholly or in part by any person residing within the *United States*, or by any citizen thereof
p. 119 residing elsewhere, which shall perform certain | acts recited in the law, becomes liable to forfeiture. It seems to the court to be a correct construction of these words to say, that the vessel must be of this description, not at the time of the passage of the law, but at the time when the act of forfeiture shall be committed. The cases of forfeiture are, 1st. A vessel of the description mentioned, which shall be voluntarily carried, or shall be destined, or permitted to proceed to any port within the *French* Republic. She must, when carried, or destined, or permitted to proceed to such port, be a vessel within the description of the act.

The second class of cases are those where vessels shall be sold, bartered, entrusted, or transferred, for the purpose that they may proceed to such port or place. This part of the section makes the crime of the sale dependent on the purpose for which it was made. If it was intended that any American vessel sold to a neutral should, in the possession of that neutral, be liable to the commercial disabilities imposed on her while she belonged to citizens of the *United States*, such extraordinary intent ought to have been plainly expressed ; and if it was designed to prohibit the sale of *American* vessels to neutrals, the words placing the forfeiture on the intent with which the sale was made ought not to have been inserted.

The third class of cases are those vessels which shall be employed in any traffic by or for any person resident within the territories of the *French* Republic, or any of its dependencies.

In these cases too the vessels must be within the description of the act at the time the fact producing the forfeiture was committed.

The *Jane* having been completely transferred in the island of *St. Thomas*, by a *bona fide* sale to *Jared Shattuck*, and the forfeiture alleged to have accrued on a fact subsequent to that transfer, the liability of the vessel to forfeiture must depend on the inquiry whether the purchase was within the description of the act.

p. 120 *Jared Shattuck* having been born within the *United* | *States*, and not being proved to have expatriated himself according to any form prescribed by law, is said to remain a citizen, entitled to the benefit and subject to the disabilities imposed upon *American* citizens ; and, therefore, to come expressly within the description of the act which comprehends *American* citizens residing elsewhere.

Whether a person born within the *United States*, or becoming a

citizen according to the established laws of the country, can divest himself absolutely of that character otherwise than in such manner as may be prescribed by law, is a question which it is not necessary at present to decide. The cases cited at bar and the arguments drawn from the general conduct of the *United States* on this interesting subject, seem completely to establish the principle that an *American* citizen may acquire in a foreign country, the commercial privileges attached to his domicil, and be exempted from the operation of an act expressed in such general terms as that now under consideration. Indeed the very expressions of the act would seem to exclude a person under the circumstances of *Jared Shattuck*. He is not a person under the protection of the *United States*. The *American* citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of our government; and if, without the violation of any municipal law, he should be oppressed unjustly, he would have a right to claim that protection, and the interposition of the *American* government in his favour, would be considered a justifiable interposition. But his situation is completely changed, where by his own act he has made himself the subject of a foreign power. Although this act may not be sufficient to rescue him from punishment for any crime committed against the *United States*, a point not intended to be decided, yet it certainly places him out of the protection of the *United States* while within the territory of the sovereign to whom he has sworn allegiance, and consequently takes him out of the description of the act.

It is therefore the opinion of the court, that the | *Charming Betsy*, p. 121 with her cargo, being at the time of her recapture the *bona fide* property of a *Danish* burgher, is not forfeitable, in consequence of her being employed in carrying on trade and commerce with a *French* island.

The vessel not being liable to confiscation, the court is brought to the second question, which is:

2d. Are the recaptors entitled to salvage?

In the case of the *Amelia*[1] it was decided, on mature consideration, that a neutral armed vessel in possession of the *French* might, in the then existing state of hostilities between the two nations, be lawfully captured; and if there were well founded reasons for the opinion that she was in imminent hazard of being condemned as a prize, the recaptors would be entitled to salvage. The court is well satisfied with the decision given in that case, and considers it as a precedent not to be departed from in other cases attended with circumstances substantially similar

[1] 1 Cranch, 1; p. 163, *ante*.

to those of the *Amelia*. One of these circumstances is, that the vessel should be in a condition to annoy *American* commerce.

The degree of arming which should bring a vessel within this description has not been ascertained, and perhaps it would be difficult precisely to mark the limits, the passing of which would bring a captured vessel within the description of the acts of Congress on this subject. But although there may be difficulty in some cases, there appears to be none in this. According to the testimony of the case, there was on board but one musket, a few ounces of powder, and a few balls. The testimony respecting the cutlasses is not considered as shewing that they were in the vessel at the time of her recapture. The capacity of this vessel for offence appears not sufficient to warrant the capture of her as an armed vessel. Neither is it proved to the satisfaction of the court, that the *Charming Betsy* was in such imminent hazard of being condemned as to entitle the recaptors to salvage. |

p. 122 It remains to inquire whether there was in this case such probable cause for sending in the *Charming Betsy* for adjudication as will justify captain *Murray* for having broken up her voyage, and excuse him from the damages sustained thereby.

To effect this there must have been substantial reason for believing her to have been at the time wholly or in part an *American* vessel, within the description of the act, or hired, or employed by *Americans*, or sold, bartered, or trusted for the purpose of carrying on trade to some port or place belonging to the *French* Republic.

The circumstances relied upon are principally,

1st. The *proces verbal* of the *French* captors.

2d. That she was an *American* built vessel.

3d. That the sale was recent.

4th. That the captain was a *Scotchman*, and the muster roll shewed that the crew were not *Danes*.

5th. The general practice in the *Danish* islands of covering neutral property.

1st. The *proces verbal* contains an assertion that the mate declared that he was an *American*, and that their flag had been *American*, and had been changed during the cruise to *Danish*, which declaration was confirmed by several of the crew.

If the mate had really been an *American*, the vessel would not on that account have been liable to forfeiture, nor should that fact have furnished any conclusive testimony of the character of the vessel. The *proces verbal* however ought for several reasons to have been suspected. The general conduct of the *French West-India* cruisers and the very circumstance of declaring that the *Danish* colors were made during the chase, were sufficient to destroy the credibility of the *proces verbal*.

Captain *Murray* ought not to have believed that an *American* vessel trading to a *French* port in the assumed character of a *Danish* bottom, would have been without *Danish* colors. |

That she was an *American* vessel, and that the sale was recent, p. 123
cannot be admitted to furnish just cause of suspicion, unless the sale of *American* built vessels had been an illegal or an unusual act.

That the captain was a *Scotchman* and that the names of the crew were not generally *Danish*, are circumstances of small import, when it is recollected that a very great proportion of the inhabitants of *St. Thomas's* are *British* and *Americans*.

The practice of covering *American* property in the islands might and would justify captain *Murray* in giving to other causes of suspicion more weight than they would otherwise be entitled to, but cannot be itself a motive for seizure. If it was, no neutral vessel could escape, for this ground of suspicion would be applicable to them all.

These causes of suspicion taken together ought not to have been deemed sufficient to counterbalance the evidence of fairness with which they were opposed. The ship's papers appear to have been perfectly correct, and the information of the captain uncontradicted by those belonging to the vessel who were taken with him, corroborated their verity. No circumstance existed, which ought to have discredited them. That a certified copy of *Shattuck's* oath, as a *Danish* subject, was not on board, is immaterial, because, being apparently on all the papers a burgher and it being unknown that he was born in the *United States*, the question, whether he had ceased to be a citizen of the *United States* could not present itself.

Nor was it material that the power given by the owners of the vessel, to their captain to sell her in the *West-Indies*, was not exhibited. It certainly was not necessary to exhibit the instructions under which the vessel was acquired, when the fact of acquisition was fully proved by the documents on board and by other testimony.

Although there does not appear to have been such cause to suspect the *Charming Betsy* and her cargo to have been *American*, as would justify captain *Murray* in bringing her in for adjudication, yet many other circumstances combine with the fairness of his character to produce | a conviction that he acted upon correct motives, from a sense of p. 124
duty; for which reason this hard case ought not to be rendered still more so by a decision in any respect oppressive.

His orders were such as might well have induced him to consider this as an armed vessel within the law, sailing under authority from the *French* republic; and such too as might well have induced him to trust to very light suspicions respecting the real character of a vessel appearing to belong to one of the neutral islands. A public officer entrusted on

the high seas to perform a duty deemed necessary by his country, and executing according to the best of his judgment the orders he has received, if he is a victim of any mistake he commits, ought certainly never to be assessed with vindictive or speculative damages. It is not only the duty of the court to relieve him from such when they plainly appear to have been imposed on him, but no sentence against him ought to be affirmed where, from the nature of the proceedings, the whole case appears upon the record, unless those proceedings are such as to shew on what the decree has been founded, and to support that decree.

In the case at bar damages are assessed as they would be by the verdict of the jury, without any specifications of items which can shew how the account was made up, or on what principles the sum given as damages was assessed. This mode of proceeding would not be approved of if it was even probable from the testimony contained in the record that the sum reported by the commissioners of the district court was really the sum due. The district court ought not to have been satisfied with a report giving a gross sum in damages unaccompanied by any explanation, of the principles on which that sum was given. It is true captain *Murray* ought to have excepted to this report. His not having done so however does not cure an error apparent upon it, and the omission to shew how the damages which were given had accrued, so as to enable the judge to decide on the propriety of the assessment of his commissioners, is such an error.

Although the court would in any case disapprove of this mode of proceeding, yet in order to save the parties the costs of further prose-
p. 125 cuting this business in the circuit | court, the error which has been stated might have been passed over, had it not appeared probable that the sum, for which the decree of the district court was rendered, is really greater than it ought to have been according to the principles by which the claim should be adjusted.

This court is not therefore satisfied with either the decree of the district or circuit court, and has directed me to report the following decree :

Decree of the Court.

This cause came on to be heard on the transcript of the record of the circuit court, and was argued by counsel ; on consideration whereof, it is adjudged, ordered, and decreed, as follows, to wit : That the decree of the circuit court, so far as it affirms the decree of the district court, which directed restitution of the vessel, and payment to the claimant of the net proceeds of the sale of the cargo in Martinique, deducting the costs and charges there, according to amount exhibited by capt. *Murray's* agent, being one of the exhibits in the cause, and so far as it directs the parties to bear their own costs, be affirmed ; and that the

residue of the said decree, whereby the claim of the owner to damages for the seizure and detention of his vessel was rejected, be reversed.

And the court, proceeding to give such further decree as the circuit court ought to have given, doth further adjudge, order, and decree, that so much of the decree of the district court as adjudges the libellant to pay costs and damages, be affirmed; but that the residue thereof, by which the said damages are estimated at 20,594 dollars, 16 cents, and by which the libellant was directed to pay that sum, be reversed and annulled. And this court does further order and decree, that the cause be remanded to the circuit court, with directions to refer it to commissioners, to ascertain the damages sustained by the claimants, in consequence of the refusal of the libellant to restore the vessel and cargo at Martinique, and in consequence of his sending her into a port of the *United States* for adjudication; and that the said commissioners be instructed to take the actual prime cost of the cargo and vessel, with interest thereon, including | the insurance actually paid, and such ex- p. 126
penses as were necessarily sustained in consequence of bringing the vessel into the *United States*, as the standard by which the damages ought to be measured. Each party to pay his own costs in this court and in the circuit court.—All which is ordered and decreed accordingly.

A true copy.

E. B. CALDWELL, *Clerk*
Sup. Court U. States.

Captain *Murray* was reimbursed his damages, interest and charges, out of the Treasury of the *United States*, by an act of Congress, *January* 31st, 1805.

William Maley v. Jared Shattuck.

(3 Cranch, 458) 1806.

The commander of a United States ship of war, if he seizes a vessel on the high seas, without *probable cause*, is liable to make restitution in value, with damages and costs, even although the vessel is taken out of his possession by a superior force; and the owner is not bound to resort to the recaptor, but may abandon and hold the original captor liable for the whole loss.

A foreign sentence of condemnation as good prize is not conclusive evidence that the legal title to the property was not in a subject of a neutral nation.

On the 20th of August, 1804, Jared Shattuck exhibited his libel in the district court of the United States, for the district of Pennsylvania, in the following form:[1] |

To the honourable Richard Peters, Esq. judge of the district court p. 459
of the United States, in and for the district of Pennsylvania.

[1] As there are so few forms of admiralty proceedings in print, it is hoped that a recital of a considerable part of the record in this case, will be acceptable to the profession; particularly as it is not a libel *in rem*, but for *restitution in value*; for not bringing in the vessel and cargo for adjudication.

The libel of Jared Shattuck, merchant, most respectfully sheweth,

That your libellant, being a subject of his majesty, the king of Denmark, sometime in or about the beginning of the month of May, in the year of our Lord 1800, at St. Thomas, one of his said majesty's West-India islands, loaded a certain schooner or vessel called the Mercator, being an unarmed merchantman, fitted out at St. Thomas aforesaid, for trade only, and being then and there *bona fide* the property of your libellant, with a cargo of merchandise, consisting of provisions, wines, and dry goods, for the sole and *bona fide* account of your libellant, said cargo amounting to 13,920 dollars, or thereabouts, on a voyage to *Jacmel* and *Port-Republican*, in the island of *St. Domingo*, which he consigned to Toussaint Lucas, also a Danish subject, then and there master of the said schooner Mercator, who was instructed by your libellant to dispose of the said cargo at *Jacmel* or *Port-Republican* aforesaid, to the best advantage, for account of your libellant, invest the proceeds in coffee of good quality, and return therewith to the said island of St. Thomas. And your libellant further saith, that on or about the 6th day of the said month of May, the said *Toussaint Lucas* sailed in the said schooner from the said island of St. Thomas, upon the said voyage for *Jacmel* and *Port-Republican*, having on board the said cargo, and also a private adventure belonging to the said *Toussaint Lucas*, together with all such necessary papers and documents, for ascertaining the property and neutrality of the said vessel and her cargo, as are usually carried by vessels belonging to Danish subjects ; and proceeded on his said voyage until on or about the 14th day of the said month of May, when, in endeavouring to enter the said port of *Jacmel*, the said schooner Mercator was met with by a certain schooner, called the *Experiment*, a public armed vessel belonging to the government of the United States of America, and commanded by William Maley, a lieutenant in the navy of the said United States, who unlawfully, and in violation of the law of nations,
p. 460 took possession of the said schooner Mercator, and put | on board of her a prize-master, and four seamen, who carried the said schooner Mercator, and her cargo, to places unknown to your libellant. And so it is, may it please your honour, that neither the said William Maley, nor any person or persons acting under him, *have brought the said schooner Mercator, or her cargo, to legal adjudication in any court of the United States, having admiralty jurisdiction.*

To the end, therefore, that complete justice may be done to your libellant in the premises, may it please your honour to direct a monition to issue out of this honourable court, directed to said William Maley, Esq. commanding him forthwith *to proceed in due form in this honourable court, against the said schooner Mercator, and her cargo, in order to obtain a legal adjudication of the same in due course of admiralty*

proceedings, or in default thereof, to appear before your honour, at such time and place as to your honour shall seem fit, to answer your libellant in the premises, and show cause why, by the said honourable court's final sentence and decree, he shall not be adjudged to make restitution in value, and pay to your libellant the whole amount of his loss aforesaid, with full damages and costs, and that such further justice may be done to your libellant in the premises, as to this honourable court shall ever seem meet, and your libellant shall ever pray, &c.

PETER S. DUPONCEAU, for libellant.

To this libel, Maley appeared,[1] and filed the protest following :

To the honourable Richard Peters, Esq. judge of the district court of the United States, in and for the district of Pennsylvania.

The protest of William Maley, Esq. late commander of the schooner Experiment, a public armed vessel of the United States of America, appearing here in court, to avoid all and all manner of contempt, contumacy and | default, under this his protest, against the libel filed by Jared p. 461
Shattuck, merchant.

This protestant, saving and reserving to himself all, and all manner of exception to the manifest uncertainties, imperfections and insufficiencies, in the said libel contained, and protesting that he ought not, in any wise, to be required to appear thereto, or to proceed against the schooner Mercator, and her cargo, as is therein prayed, nevertheless, for the reasons aforesaid, and as cause why the said libel should be dismissed without further appearance or answer, avers, propounds and says,

That true it is, that the said protestant, while commanding the said schooner Experiment, a public armed vessel of the United States of America, under a lawful commission and authority from the government of the said United States of America, did on or about the 15th day of May, 1800, meet on the high seas, and take possession of the said schooner called the Mercator, in the said libel mentioned, and put on board an officer and four seamen. But this protestant denies, that by so doing, he acted unlawfully and in violation of the law of nations ; for he avers, propounds, and says, that since the passing of the act of the said United States of America, entitled, ' an act further to suspend the commercial intercourse between the United States and France, and the dependencies thereof,' and before the said 15th day of May, 1800, that is to say, on the day of in the year 1799, the said schooner, called the Mercator, being an American registered vessel, owned, hired and employed by a person or persons resident within the said United States, or by citizens thereof, resident elsewhere, sailed and departed from the port of Baltimore, within the said United States, and at the time of her being met and

[1] It does not appear that a monition issued. The *appearance* of Maley seems, by the record, to have been voluntary.

taken possession of by this protestant as aforesaid, and before her return within the said United States, was proceeding directly, or from some intermediate port or place, to *Jacmel*, a port or place within the island of St. Domingo, within the territory or dependencies of the French republic. And this protestant further avers, propounds and says, that at the time of his meeting and taking possession of the said schooner Mercator as aforesaid, she was steering a direct course for the said port of *Jacmel*,
p. 462 and not for Port-au-Prince, whereas, the letter of | instructions from the said Jared Shattuck, the libellant, and all the other papers exhibited to this protestant, by Toussaint Lucas, the master of the said schooner Mercator, or found on board thereof, falsely, fraudulently, and colourably, represented and declared, among other things, that the said schooner was bound on a voyage from the island of St. Thomas to Port-au-Prince, a place then in the power and possession of the British troops, and not within the territory or dependencies of the French republic. And this protestant further avers, propounds and says, that at the time of his meeting and taking possession of the said schooner Mercator as aforesaid, the master thereof appeared to be a *Frenchman* (although this protestant has since heard, but does not admit, that he is an Italian) and the crew consisted chiefly of Portuguese and Italians, nor was there then, nor at any time before or since, exhibited to this protestant, any burgher's brief or briefs, or other evidence whatsoever, that the said master, or crew, or any part thereof, had become burghers of the said island of St. Thomas, or were otherwise naturalized subjects of the king of Denmark, without which this protestant avers, that the said master and crew could not lawfully command and navigate a Danish vessel, according to the laws and usages of Denmark. And this protestant further avers, propounds, and says, that the said Jared Shattuck, the libellant, alleging himself to be the owner of the said schooner Mercator and her cargo, and to be a burgher of the island of St. Thomas, (neither of which allegations is admitted by this protestant) was born in the state of Connecticut, one of the United States aforesaid, nor did it satisfactorily appear to this protestant, (considering the many other proofs and causes of suspicion to the contrary) at the time of his meeting and taking possession of the said schooner Mercator, as aforesaid, nor has it so appeared at any time since, that the said Jared Shattuck, the libellant, had, by any lawful act of expatriation, or otherwise, at any time, become a subject or citizen of any other government or nation, and ceased to be a citizen of the said United States, owing fidelity and allegiance thereunto ; but admitting it to be true, that the said Jared Shattuck, the libellant, was an inhabitant of the said island of St. Thomas, this protestant did then, and does still,
p. 463 verily believe, that the said Jared Shattuck had repaired to the | said island of St. Thomas, or remained there, for the purpose of carrying on

an illicit and clandestine commerce with ports and places within the territory and dependencies of the French republic, during the hostilities which were then waged between the United States and the French republic, and also between the king of Great Britain and the said French republic. And this protestant further avers, propounds, and says, that believing, from all the appearances, circumstances, and reasonable and just causes of suspicion, herein before averred and propounded, touching the original American character of the said schooner Mercator, the voyage on which she was actually proceeding, the false destination declared and represented in the said letter of instructions, and other papers exhibited and found on board, the description of the master and crew, and the birth-place and original allegiance of the said Jared Shattuck, the libellant, that the said schooner Mercator, was a registered vessel of the said United States, voluntarily carried or suffered to proceed to a French port or place as aforesaid, and to be employed as aforesaid, contrary to the intent, and in defiance of the prohibitions of the said act of the congress of the United States, entitled 'an act further to suspend the commercial intercourse between the United States and France, and the dependencies thereof.' This protestant, in obedience to the said act of congress, and to his official instructions, took possession of the said schooner as aforesaid, with a view to such further examination and proceedings as the law of nations, and the laws of the United States, should warrant, justify, and require. But this protestant avers that such possession was taken lawfully, upon the just and reasonable causes, motives, and designs, aforesaid, and with the utmost care, caution, and solicitude, that the said schooner Mercator and her cargo, should thereby suffer no injury, damage, or spoliation; and that the real national character, and the real commercial objects of the said schooner Mercator, of her pretended owner, and of the said master and crew, while prosecuting her said voyage, should be more fully examined, and satisfactorily ascertained, without any unnecessary detention or delay, this protestant, at the time of placing on board of the said schooner Mercator, an officer and four seamen, as aforesaid, did not remove, nor take therefrom, the said master and crew of the said schooner Mercator, or any of | them, p. 464
nor remove, take away, cancel, or destroy, any of the papers and documents of said schooner Mercator, and her cargo, but ordered the officer, so put on board of the said schooner, having on board her said master and crew, and all the documents and papers of the said schooner and cargo, to make the best of his way to Cape Francois, there to deliver all his letters to Silas Talbot, Esq. then commodore and commander of the public vessels of the said United States, upon that station, and to wait the orders of the said Silas Talbot, with express instructions, also, to pay particular attention to every thing belonging to the said schooner Mercator

and her cargo, seeing that nothing should go to waste, and to deliver the said schooner to the said master thereof, if the said Silas Talbot, commodore and commander as aforesaid, should clear her. And this respondent further avers, propounds, and says, that in a short time, not exceeding the space of six hours, or thereabouts, after the said schooner Mercator had parted from the said schooner *Experiment*, destined for Cape Francois as aforesaid, under the orders aforesaid, the said schooner Mercator was captured on the high seas, as prize, by a British private armed vessel of war, called the *General Simcoe*, commanded by Joseph Duval, who thereupon forcibly took the said schooner Mercator and her cargo, from and out of the possession, care, custody and controul, as well of the said master and crew, of the said schooner Mercator, as of the said officer and men who had been put on board of her, as aforesaid, by this protestant, and who were, thereupon, taken out of and removed from the said schooner Mercator, into, and on board of the said British privateer, and the said schooner Mercator and her cargo, sent to the island of Jamaica, under the charge of a prize master and men belonging to the said British privateer, without the assent, connivance, assistance, negligence, or fault, whatsoever, of this protestant, or of the officer and men whom he had put on board of the said schooner Mercator, as aforesaid, for the causes, and with the intentions, aforesaid. And this protestant further avers, propounds, and says, that the said schooner Mercator and cargo, being so, as aforesaid, captured on the high seas, as prize, and sent to the said island of Jamaica, by the said British privateer, a libel, in due form of law was exhibited and filed by the said captors, in the court
p. 465 of vice-admiralty, lawfully established in the said | island of Jamaica, (being a court of competent jurisdiction in all matters of prize) alleging, and charging, that the said schooner Mercator and cargo, were the property of France, or of the king of Spain, or of some person or persons being subjects of France, or of the king of Spain, or inhabiting within some of the territories of France, or of the king of Spain, and were good and lawful prize, inasmuch as hostility and war then notoriously subsisted between the king of Great Britain, on the one part, and the said French republic and the king of Spain, on the other part ; and thereupon the said captors, in their said libel, prayed that the said schooner Mercator and her cargo, might be adjudged lawful prize, and be confiscated and condemned. And this protestant further avers, propounds, and says, that, notwithstanding the denial of the said Jared Shattuck, in his said libel contained, he, the said Jared Shattuck, received speedy and full notice, that the said schooner Mercator, and her cargo, were captured as prize, and sent into the said island of Jamaica, as aforesaid, and there prosecuted by the said captors as prize, in manner aforesaid ; and, thereupon, a claim was exhibited, and a defence made, by and for the said Jared Shattuck,

the alleged owner of the said schooner Mercator and her cargo. And upon hearing of the parties, by their respective advocates, and upon examining all the ship's papers and documents, together with other evidence and proofs in the cause, the judge of the said court of vice-admiralty, was pleased to adjudge and decree, that the said schooner Mercator, and her general cargo, were good and lawful prize, and did therefore adjudge, order, and decree, that the same be condemned and confiscated to the use of the said captors, &c. From which sentence, the said Jared Shattuck, the libellant, prayed leave to appeal, which was granted. But this protestant avers, that this appeal has not been duly prosecuted by the said Jared Shattuck, but has been altogether waived and abandoned.

And this protestant further avers, &c. that at the time of the capture of the said schooner and cargo, by the British privateer, as aforesaid, and at the time of the libel and of the condemnation, and of the appeal, as aforesaid, peace and amity notoriously subsisted between the United States of America, and the king of Great Britain and the king of Denmark; and also between | the said king of Great Britain and the said king of p. 466
Denmark, and their respective citizens and subjects: and, therefore, this protestant avers, that if the allegations contained in the libel of the said Jared Shattuck, had been true, sentence of condemnation and confiscation, as prize, could not, and would not, have been pronounced, as aforesaid, against the said schooner Mercator and her cargo, by the said court of vice-admiralty, having competent jurisdiction upon all matters of prize, as aforesaid, and therein proceeding according to the law of nations and the faith of treaties.

Wherefore, this protestant prays that the said libel may be dismissed with costs, &c.

A. J. DALLAS, for the protestant.

The replication of Shattuck, was as follows:

To the honourable Richard Peters, Esq. judge of the district court of the United States, in and for the district of Pennsylvania.

In the case of the schooner Mercator, and her cargo, *Toussaint Lucas*, master.

The replication of Jared Shattuck, late owner of the said schooner Mercator, and her cargo, to the protest of William Maley, Esq. late commander of the public armed schooner of the United States Experiment.

This replicant, not confessing or acknowledging any of the facts, matters, and things, by the said William Maley, in and by his said protest set forth, propounded and alleged, and also saving and reserving to himself all, and all manner of exception to the manifold uncertainties and insufficiencies in the said protest contained, and to the informality thereof, and *protesting on his part*, that the said William Maley ought to have appeared absolutely, and not under protest, and made direct answer,

upon oath or affirmation, to the charges in this replicant's libel contained, or to so much thereof as he has been advised to be material for him to reply unto: Doth aver, allege, propound and say, that this replicant
p. 467 was born in the | state of Connecticut, in the year 1774, and when he was between fifteen and sixteen years of age, viz. about the end of 1789 or beginning of 1790, the United States being then at peace with all the world, he migrated to the island of St. Thomas, one of the dominions of the king of Denmark and Norway, with a view to settle and establish his permanent residence in that island. That he served his apprenticeship there, with a mercantile house, for about six years, and from his first arrival, has constantly and permanently resided, and now continues to reside there. That on the 10th of April, 1797, the United States being still at peace with all the world, he became a naturalized Danish subject, and burgher of the said island, and shortly afterwards, intermarried with an inhabitant of that place, by whom he has several children, all living in that island. That he did acquire, and now holds real estate there, and is there permanently settled and established, and carries on the trade and business of a merchant.

The replication then goes on to deny, that he went or remained there for the purpose of illicit trade. It avers, that during the war between France and Great Britain, which terminated by the treaty of Amiens, he was largely concerned in trade, at and from St. Thomas to foreign ports, and had a number of vessels navigating under the Danish flag in the West-India seas. That several of his vessels were taken, as well by British as French cruisers, carried into their respective islands, and there acquitted, and his neutral character, and that of his property, was acknowledged by the tribunals of both nations.

That in May, 1800, he loaded the Mercator, as mentioned in his libel, and sent her on a voyage to St. Domingo, consigned to the said Toussaint Lucas, who was also a *bona fide* subject. That the original destination of the vessel was for Port-au-Prince, *alias* Port Republican, a place then in the power, and under the dominion of the negro general Toussaint, not of the British troops, as stated in Maley's protest. That at that time commerce was lawfully carried on between the United States and ports of St. Domingo, which were in the power of general Toussaint. That
p. 468 on the 3d of May, 1800, he gave | written instructions to Lucas, to proceed with his vessel to Port-au-Prince, but as she was ready to sail, he was informed that the forces of general Toussaint had taken Jacmel from general Rigaud, who held for the French republic. That Jacmel is a port of the island of St. Domingo, which lies between the island of St. Thomas and Port-au-Prince, and is in the way between the former and the latter. That the distance from Jacmel to Port-au-Prince, is by land only between thirty and forty miles, but by sea upwards of one hundred leagues. That

conceiving it to be advantageous to try the market at Jacmel, before proceeding to Port-au-Prince, he gave verbal directions to Lucas for that purpose.

It denies that any thing false or colourable was intended, and that any of the Mercator's papers were false or colourable, and that he gave any orders to Lucas to deny or conceal his intention of going into Jacmel.

It admits, that after the passage of the act of congress, '*further to suspend*,' &c. and before the 15th of May, 1800, the Mercator was an American registered vessel, owned by a citizen of the United States, and sailed from Baltimore, but denies, that when taken by Maley, she was navigating contrary to the laws of the United States.

It avers, that on the 26th of November, 1799, he purchased her *bona fide* at St. Thomas, for the sum of 8,500 dollars, which he had actually paid and took a bill of sale, which was on board at the time of her capture. That from the day of purchase until her capture, he was *bona fide* the sole owner, and that no other person had any interest in her or her cargo. That almost the whole shipping of the island of St. Thomas, consists of vessels built in the United States and in the island of Bermuda, and brought to the former island for sale.

That at the time of her capture, the Mercator was navigated as a *bona fide* Danish vessel, and had on board every paper and document which the law required to prove her neutrality; and especially that she had, 1st. The king's passport, in the usual form. 2d. The certificate of measurement. 3d. Her muster-roll, or official list of her crew. 4th. The bill of sale. 5th. The burgher's | brief of her captain, Toussaint Lucas. 6th. p. 469
Her clearance. 7th. The invoice and bill of lading of her cargo duly attested, as to the ownership and neutrality thereof. 8th. The captain's instructions or sailing orders; and 9th. A certificate, upon oath, of several respectable merchants of the island, attesting the fact of Shattuck's citizenship and residence in the island. That the crew consisted of eleven persons, viz. the master, the mate, seven seamen, the cook, and a boy, who were all by birth Italian or Portuguese. That the master was a native of Leghorn, in Tuscany, was a Danish subject, and had resided seven years in St. Thomas. That very few Danish seamen are to be had in the Danish islands; and that, except the officers of government, there are very few Danes in the islands of St. Thomas and St. Croix, the inhabitants being chiefly native English and Americans, with some French and other foreigners.

It denies, that by the laws of Denmark, a vessel cannot be lawfully navigated by others than Danish or naturalized Danish sailors, and avers, that the crew may be subjects of any nation whatever, provided that in time of war, not more than one-third thereof be native subjects of one or other of the belligerent powers. It denies that any of the crew of the

Mercator were subjects of any of the belligerent nations; and that at the time of her capture, there was any reasonable cause of suspicion that she was an American vessel carrying on an illicit trade. It submits to the court, whether Maley had a right, by the law of nations, to arrest a vessel on the high seas, sailing under the protection of his Danish majesty's royal passport, under pretence of a violation of a municipal law of the United States.

It suggests that Maley acted *mala fide*, and offers to prove that he was in the habit of violating the law of nations, and the instructions of his government, with respect to neutral vessels and property, and that he was dismissed from the service of the United States, principally on that account.

With respect to the capture by the British privateer, it admits that the Mercator was so captured, while under the protection of the United
p. 470 States, and their national | flag, but does not admit that it was without the connivance or fault of Maley, or the officer whom he put on board. It admits the condemnation as prize, but avers that it was the duty of the officer and men to have resisted the capture, and to have demanded of the court of vice-admiralty, at Jamaica, restitution of the vessel and cargo, on the ground, that the same had been unlawfully, and in violation of the respect due to the national vessels of the United States, and to the flag thereof, taken from the possession, and from under the protection of the commander of one of the public vessels of war of the United States.

It admits that Lucas filed a claim for the vessel and cargo, before the vice-admiralty court at Jamaica, and that they were condemned as prize, but alleges that the sentence of condemnation was contrary to the evidence. It admits also, that an appeal was entered, and exhibits an exemplification of the proceedings. It denies that Lucas was bound to exhibit a claim, or to appeal from the condemnation, and that Shattuck was bound to prosecute the appeal, but avers that the whole should have been done by or in behalf of the United States, to whom alone the vessel and cargo would legally have been restored, as having been taken from their possession, and from under their protection.

It avers that Shattuck, as soon as he received notice of the capture and condemnation, gave information thereof to the governor-general of the Danish West-India islands, and to Richard Soderstrom, charged with the consular functions for the king of Denmark, in the United States, who communicated the information, without loss of time, to the government of the United States, and claimed reparation. That the government of the United States expressed a wish, that the appeal should be prosecuted, in compliance with which, Shattuck, without delay, forwarded the necessary papers to England; but when they arrived, he was informed by his proctors that it was useless to prosecute the appeal, because

the prize-money had been distributed, and the prize agent had died insolvent. |

It denies that the vessel and cargo would not have been condemned p. 471
if they had been really and *bona fide* neutral property, and avers, that they really were such as stated in his libel, and does not admit that he is precluded by the sentence of the court of vice-admiralty of Jamaica, from showing the same.

It concludes, 'that for aught that has been said and alleged by the said William Maley, in his protest aforesaid, this replicant ought not to be precluded from obtaining the benefit of the prayer of his said libel; he therefore prays, that the said William Maley may, by the interlocutory decree of this honourable court, be ordered to appear *absolutely*, and *without protest*, before your honour, so that further justice may be done by this honourable court in the premises, as to right shall appertain.'

(Signed) JARED SHATTUCK.

Jared Shattuck being duly sworn according to law, on his oath doth say, that all and singular the facts, matters and things, by him in the foregoing replication stated, as far as they relate to his own acts, and matters within his own knowledge, are true; and inasmuch as the same relate to the acts of others, he verily believes them to be true.

(Signed) JARED SHATTUCK.

Sworn before me the 26th of May, 1804.

(Signed) RICHARD PETERS.

The rejoinder of Maley was as follows:

This rejoinant saving and reserving to himself all, and all manner of exception to the manifold uncertainties and insufficiencies in the said replication contained, and not confessing or acknowledging any of the facts, matters and things by the said Jared Shattuck in and by his said replication set forth and alleged, but denying the same, saith, that the facts in this rejoinant's protest set forth, are true and sufficient to excuse him | from further appearance and answer to the libel of the said Jared p. 472
Shattuck.

(Signed) A. J. DALLAS, for WILLIAM MALEY.

Whereupon it was adjudged, ordered and decreed, that the libel be dismissed with costs.

From which decree Shattuck appealed to the circuit court.

Upon the appeal, the circuit court[1] being of opinion that the appellant was entitled to restitution, with damages and costs, reversed the decree of the district court, overruled and rejected the protest of Maley, and ordered him to appear absolutely without protest, before the district court; to whom the cause was remitted for further proceedings.

[1] Holden by Judge Washington, in May, 1805.

In the district court, upon the remission of the cause, the following entry was made:

And now, to wit, this 9th day of August, 1805, the said William Maley, by Alexander James Dallas, his proctor aforesaid, having appeared absolutely as aforesaid, comes here into court, and for answer to the libel of the said Jared Shattuck, propounds and says, that the facts by this respondent in his said protest set forth are true, and to the intent that justice may be done in the premises, this respondent prays that the said Jared Shattuck may be called upon to declare, on his solemn oath, to whom and when, and in what manner, he paid for the said vessel called the Mercator, and whether the original American owner hath any interest therein, or in the restitution in value, by the said libel prayed for; and
p. 473 whether any correspondence, | and what, took place between the said Jared Shattuck, and the captain of the said vessel, or any other person, after she was carried into Jamaica; and whether any correspondence, and what, took place between the said Jared Shattuck and any persons, and whom, relative to the prosecution of an appeal from the decree of condemnation in Jamaica; and whether the said Jared Shattuck made any, and what application, and when, to the American government, relative to the capture of the said vessel by this respondent, as aforesaid, &c.

A. J. DALLAS, for respondent.

And thereupon the said Jared Shattuck, under all legal protestations and reservations, for replication to the answer of William Maley, abovementioned, saith, that all and singular the facts, matters and things by him this replicant in his libel, and in his replication to the answer under protest of the said William Maley, filed in this honourable court, are true. Without this, that the facts by the said respondent, in his said answer under protest set forth, are true.

He therefore humbly prays, that this honourable court, by its final decree in this cause, will be pleased to order, adjudge and decree, that the said defendant, William Maley, make restitution to this replicant of the value of the schooner Mercator, her rigging, tackle, apparel, &c. and of her cargo, at the time of her capture by the United States armed schooner Experiment, under the command of the said respondent; and that the said respondent pay to the said replicant the amount of the damages by him suffered, by reason and in consequence of the capture and loss of the said schooner Mercator, and her cargo; the said value and damages to be inquired of, estimated and reported, to this honourable court by the clerk, taking to his assistance two merchants, in the usual form; and that the said respondent pay the costs of this suit, &c.

PETER S. DUPONCEAU, proctor for libellant.

The clerk having returned an estimate of the value and damages,

amounting to 41,658 dollars and 67 cents, Maley filed the following exceptions to that report. |

1. That the respondent is charged with the expense of papers and p. 474
outfits, advances to mariners, provisions and stores for the voyage, and labour of sailors before the shipping.

2. With the certificate of neutrality of property, duties at St. Thomas, commission on shipping the cargo, and insurance, without proof that any insurance was actually paid.

3. With expenses at Jamaica, and for copies of the proceedings in the court of admiralty, and of the appeal papers.

4. With expenses of Mr. Soderstrom.

5. With too much interest.

6. That there was no proof of the actual price of the schooner other than the bill of sale on board.

7. That there was no proof of the value of the cargo other than the invoice on board.

In the district court, judgment was entered by consent in favour of the libellant, for the amount reported by the clerk, saving all exceptions upon the appeal.

In the circuit court, the following answer of Shattuck to the exceptions to the report of the clerk was filed.

To the first exception he answers: that these expenditures of outfits, &c. made after the purchase, and after the sailing of the vessel, increased the value thereof, and are properly charged as a part of the said value.

The same were allowed in the case of the Charming Betsey—confirmed by a decree of this court (the circuit court) and not appealed from.

2d. To the second exception he answers: |

1. As to the insurance, that it is a regular mercantile charge, the owner p. 475
being considered as his own insurer. That it is generally admitted in mercantile accounts. That it is peculiarly admissible in the case of an *unjust* capture, like the present, however it might be in a case of lawful capture, or capture with sufficient probable cause.

2. The commission on shipping is also a regular mercantile charge; the said commission, the duties of exportation paid at St. Thomas, and the certificate of neutrality, would have been charged on the goods, had the vessel arrived at the port of her destination. The present being a case of unjust capture, the respondent conceives that the commissioners would have been justified in allowing to him *all the loss of possible profit*, and to have taken into view the profit which he could have made, had the vessel arrived at the port of her destination, whereas they have only indemnified him for his actual losses, and he conceives that he ought not to be debarred from any part of his said indemnity.

3d. To the third and fourth exceptions he answers, that the said

expenses are reasonable, and the like were allowed and confirmed in the case of the Charming Betsey.

4th. To the fifth he answers, that the interest is not overcharged.

5th. To the sixth and seventh he answers, that the evidence of the papers found on board, is sufficient in law, in prize causes, unless contradicted by other evidence. That it is confirmed in this case by the oath of the party, contained in the pleadings in this cause.—And as to the ship, is again confirmed by the oath of the same party, taken a second time on special interrogatories of the appellant, William Maley.

The answer of Shattuck, upon oath, to the several interrogatories contained in the answer of Maley to the libel, stated, that he purchased the schooner Mercator at St. Thomas, on the 26th of November, 1799,
p. 476 of one John Liddel, of Baltimore, for the sum of 8,500 dollars, | which, at the time of purchase, he actually and *bona fide* paid to the said John Liddel, in Spanish milled dollars. That the original owner has not at present, nor has had at any time since the purchase thereof by the respondent, directly or indirectly, by way of trust, cover, or otherwise, any interest therein, nor in the restitution in value, or damages prayed for in the libel.

That to the best of his recollection, the said schooner was taken by the British privateer on the 15th of May, 1800, was carried into and arrived at Jamaica, and libelled on the 23d of the same month, and condemned as lawful prize on the 28th of June following. That the respondent was informed of the capture by a letter from Lucas, and that Dick, M'Call & Co. had taken the necessary steps to defend the property. That he was informed afterwards, by the arrival of a Mr. Grigg, in the beginning of August, 1800, that the schooner was condemned, and that an appeal had been entered. That the respondent had no opportunity of writing to Lucas during the trial. That immediately upon receiving notice of the condemnation, he applied to the commandant general of the Danish West-India islands to use his endeavours to obtain reparation from the American government, to which he received an answer, (which is lost) together with a letter for the secretary of state of the United States, which he forwarded.

That being advised that the United States were the proper party to prosecute the appeal, and fearing that his further interference might prove prejudicial to his interest, he did not prosecute the appeal until he received from Mr. Soderstrom a copy of a letter from the secretary of state of the United States to him, dated the 26th of November, 1800, by which he understood that the government of the United States wished him to prosecute his appeal, in consequence of which, he wrote for that purpose to his correspondents in London, by whom he was informed that they had taken the necessary steps to procure a reversal of the decree

of condemnation; but that in the mean time the proceeds of the sales of the prize had been paid to the *prize captain*, who had died insolvent, so that no redress was finally had. |

On the 29th of January, 1806, the circuit court affirmed the sentence p. 477
of the district court, except as to the first and second items in the report of the clerk, and decreed restitution of the value and damages, amounting to 33,244 dollars 67 cents, and costs.

From this sentence Maley appealed to this court.

The libellant also appealed as to so much of the sentence as disallowed those two items of the clerk's report.

Breckenridge, attorney general, for the *appellant,* and *Harper, Key,* and *Martin,* for the *appellee.*

Argument for the appellant.

Two grounds were taken by the attorney general:

1st. That Maley had committed no act *mala fide,* but was in the performance of an authorised public duty, and was therefore justified.

2d. That the claim to reparation is without merit, and without law.

1. The act being done in the execution of a public duty, cannot, in our courts, be considered as done *mala fide.*

It was the policy of the times to prevent our citizens, whether resident here or abroad, from trading directly or indirectly with the French; and that policy ought to be kept in view when the several acts of congress on this subject are under consideration. These acts are in *vol.* 4, *p.* 129, *June 13th,* 1798, and *p.* 244, *9th Feb.* 1799, and *vol.* 5, *p.* 15, *27th Feb.* 1800. These laws being all in *pari materia,* are to be taken into one view, and although some of them had expired, yet it is proper that they should be considered when deciding upon the construction of subsequent statutes on the same subject.

All the acts went successively to cut off the intercourse *more effectually.* The fifth section of the act of February, | 1799, authorises the President p. 478
to give *instructions* to the commanders of the public armed ships to *stop, examine,* and *send in* ships suspected—*vol.* 4, *p.* 247. This was going a step further than the act of June, 1798, which did not authorise any such instructions.

The act of *Feb.* 1800, (*vol.* 5. *p.* 15) goes further still, and extends the prohibition of intercourse to citizens of the United States residing abroad; and expressly prohibits the island of *Hispaniola,* excepting such ports as should be excepted by the proclamation of the President.

Under the act of 1799, the President caused the instructions[1] of 12th of March, 1799, to be issued to the commanders of the public armed vessels of the United States, by which their attention was particularly

[1] See these instructions at length, cited in the case of *Barreme* v. *Little,* 2 *Cranch,* 171.

called to the practice of covering the illicit trade under the *Danish* flag. The direction not to injure or harrass the fair neutral commerce, implies a right to stop and examine; and if, upon such examination, they should have reasonable cause to suspect that the vessel was engaged in violating the law, the instructions, as well as the law, required them to seize and send her in for adjudication. There was, therefore, a clear right (at least a right which our courts cannot deny) to detain the vessel a reasonable time for examination, and if it was a doubtful case, to send her for further examination to the commanding officer on that station.

That there was probable cause sufficient to justify such a measure, (however it might be in a case of actual seizure, and sending in for adjudication) can scarcely be doubted.

1. Shattuck was a native American citizen, resident in a place suspected by our government. The certificate of the merchants of St. Thomas, respecting his burghership, naturally led to suspicion. It appears, by the letters in the record, that although his neutrality had been respected in Tortola, yet it had not been respected in Jamaica. |

p. 479 2. The vessel was known to have been built in the United States, and to have lately belonged to American citizens. She had sailed from Baltimore after the passing of the act of congress.

3. The ship's papers showed her destination to be to *Port-au-Prince*, a place not prohibited; but she was stopped as she was entering *Jacmel*, a forbidden port.

An attempt is made to account for this, by verbal orders, but there is no proof of them; and it does not appear that Lieut. Maley was informed of such orders, at the time of the detention, nor of the fact that *Toussaint* had possession of the place.

But if Maley had known of the verbal orders, the reason assigned by Shattuck for those orders, was, in itself, a strong ground of suspicion. The reason was, that he had heard that *Toussaint* had possession of *Jacmel*. If the vessel and cargo were *bona fide* Danish property, he might, with equal safety, have traded there while the place was in possession of *Rigaud*, as while in that of *Toussaint*. The reason could only apply to *American* property, upon the presumption that the United States would take off the prohibition, when it should be known that *Jacmel* was no longer under the acknowledged jurisdiction of *France*.

4. All the material papers were not produced. The master did not produce his burgher's brief, showing him to be a Danish subject; and a Danish vessel cannot lawfully sail, but under a Danish master.

The attestation of his burgher's brief, is dated long after the vessel was stopped.

It must be remembered, that Maley did not *seize* the vessel, as a prize, or as a forfeiture, but only *detained* her for further examination. The

question, therefore, is not whether there was probable cause of *seizure*, but probable cause for *further examination*.

The master was not dispossessed of his vessel; none of the crew were taken out; her papers were not removed; no violence or outrage was committed. But | while detained for further examination, the vessel was p. 480
seized by a stronger hand and carried away by a superior force.

If it be objected that no resistance was made; it is answered that none could be made. The vessel was not armed; and the officer was bound by his instructions, to permit the right of search by all the belligerents except France.

If it be said, that Maley ought to have claimed the vessel, in Jamaica—the answer is, that he had no right to seize, unless it was really an American vessel. If she was a fair neutral, Shattuck's claim must prevail.

If she was an American vessel she would not be condemned; if she was any thing else, he was not interested.

Maley's possession, therefore, was lawful and *bona fide*. If a loss has happened, it has been produced by the *vis major* of another, to whom the injured party ought to look for reparation, 4 *Rob.* 284. Maley's possession being *bona fide*, he cannot be answerable for the *mala fide* act of another.

He detained the vessel only *six hours;* and she was sailing towards *Port-au-Prince*, the ostensible place of her destination, when captured by the British ship of war.

Even if Maley was mistaken, but acted with good faith, he is not answerable for the loss. 1 *Rob.* 18. *The Betsey.*

That was an American ship and cargo, taken by the *English*, at the capture of *Guadaloupe*, in April 1794; and *retaken* by the *French*, in June following. The American claimants libelled the *English* captors for restitution *in value*. The captors defended themselves by an allegation that the ship had broken the blockade.

Sir William Scott, after deciding that there was no defence, on the ground of breach of blockade, stated the question to be, whether the original captors were exonerated of their responsibility to the American claimants. | 'It is to be observed,' says he 'that at the time of recapture, p. 481
America was a neutral country, and in amity with *France*. I premise this fact as an important circumstance in one part of the case; but the principal points for our consideration are, whether the possession of the original captors was, in its commencement, a legal *bonae fidei* possession? And, 2d, whether such a possession, being just in its commencement, became afterwards, by any subsequent conduct of the captors, tortious and illegal? For on both these points the law is clear, *that a bona fide possessor is not responsible for casualties; but that he may, by subsequent misconduct, forfeit the protection of his fair title, and render himself liable*

to be considered as a trespasser from the beginning. This is the law, not of this court only, but of *all* courts, and *one of the first principles of universal jurisprudence.'*

He then notices two cases very much in point. '*The Nicholas and Jan* was one of several *Dutch* ships taken at *St. Eustatius*, and sent *home*, under convoy, to *England*, for adjudication. In the mouth of the channel they were retaken by the *French* fleet. There was much *neutral property* on board, *sufficiently documented*,' and a demand of restitution, in value, was made by the neutral owners, on the first captors. One of the grounds of the demand was, that the captors had *wilfully* exposed the property to danger, by bringing it home when they might have resorted to the admiralty courts, in the West-Indies; but on this point the court was of opinion, that under all the circumstances, they had not exceeded the discretion necessarily entrusted to them by the nature of their command.

It was also urged against the *claimants* in that case, that since the property had been retaken by their *allies*, they had a right to demand restitution *in specie* from them; and on those grounds the English courts rejected their claims.

The other case which he cites, *The Hendrick and Jacob*, is still more like the present. A *Hamburghese* ship was *erroneously* taken as *Dutch*, and *retaken* by a *French* privateer, and was *lost* going into *Nantz.* |

p. 482 On demand for restitution, against the *British* captor, the lords of appeal decided, that as it was a seizure made on *unjustifiable* grounds, the owners were entitled to restitution from *some* quarter; that as the *French* recaptor had a justifiable possession, under *prize* taken from *his enemy*, he was not responsible for the accident that had befallen the property in his hands. That if the property had been *saved indeed*, the claimant must have looked for redress to the justice of his ally, the *French;* but since that claim was absolutely extinguished, *by the loss of the goods*, the proprietor was entitled to indemnification from the original captor.

After citing these authorities, Sir W. Scott inquires, whether, in the case then before him, the original seizure was so wrongful, as to induce that strict responsibility, which attaches to a tortious and unjustifiable possession.

He then states some grounds of suspicion which might have appeared to the captors, as to the fairness of the neutrality, and proceeds to inquire whether any conduct of the captors, after the first seizure, had rendered them liable to the *strictest* responsibility. 'On this point,' says he, 'I must distinctly lay it down, that the irregularities, to produce this effect, must have been such as would *justly* prevent restitution by the French. If such a case could be supported, I will admit there might then be just

grounds for resorting to the *British* captor for indemnification; but till this is proved, *the responsibility which lies on recaptors to restore the property of allies and neutrals, will be held by these courts to exonerate the original captors.*' In the conclusion of his opinion he says, 'if the neutral has sustained any injury, it proceeds not from the *British*, but from the *French*; and there is no reason that *British* captors should pay for *French* injustice.'

So we say in our case, there is no reason that the American officer, who merely stopped the vessel for examination, should pay for British injustice.

2. That the claim to reparation is without merit, and without law. |

Shattuck was himself the cause of the suspicious circumstances which p. 483
led to the detention of the vessel by Maley, who would have been guilty of a neglect of duty, and disobedience of orders, if he had done otherwise than he did. There was no improper conduct on his behalf, and the whole detention was only six hours. The British were bound to restore the vessel and cargo without salvage, and with damages and costs, if it was really the property of a neutral, and this would have been done, without doubt, if Shattuck had prosecuted his appeal, and been able to prove his property, But having acquiesced in the decree of condemnation as enemy-property, he can never deny the fact. It is conclusive evidence against him. If not conclusive, it is still evidence of probable cause of suspicion. Upon the evidence which caused Maley to *suspect*, the court of admiralty *condemned*. This is surely sufficient to justify his detention of *six hours* for examination.

Argument for the appellee. Unless the taking was lawful, or with probable cause, the captor is liable for all the loss. This principle is admitted by the argument for the appellant. The case of the *Charming Betsey*, 2 *Cranch*, 64, was stronger in favour of captain Murray than this is in favour of lieutenant Maley; and yet, in that case, this court decided that captain Murray was a trespasser, and liable for damages and costs.

It is no answer to say, that the loss does not appear to have been the consequence of Maley's act. If the taking was unlawful, he is liable at all events. It is like the case of deviation, which throws the loss upon the assured, although the loss was not the consequence of the deviation. It is sufficient if it exposed the property in any manner to a liability to danger. But here it is evident that the loss would not have happened, if the vessel had not been detained. She was within an hour's sail of Jacmel, and would have gone in with safety. |

Two questions present themselves for consideration. p. 484

1st. Was the capture lawful? and,

2d. Was there probable cause?

A third question may also arise, whether, upon the appeal of Shattuck, the sentence of the district court ought not to be affirmed, as to the items excepted to by the counsel for Maley.

1. The first question is, whether the capture was lawful? On this point the case of the *Charming Betsey* is conclusive. It was there decided by this court,

1st. That the *non-intercourse law* did not extend to vessels built in the United States, and *bona fide* sold before the act of trading. In the present case the vessel was sold before the existence of the act under which her seizure is now attempted to be justified.

2d. That the sale must appear to be made with intent to evade the law.

3d. That a native citizen of the United States may so far change his national character, as to take him out of the operation of that act. The present appellee is the same person whose property was in contest in that case; and although that fact does not appear on this record, yet it appears that he is a person in exactly the same circumstances.

But the sentence of the vice-admiralty court in Jamaica, is said to be conclusive evidence against Shattuck.

But the sentence is only conclusive evidence that she was *good prize* to the British. It does not state for what cause. It contains no direct reference to the libel, or other parts of the proceedings. If it refers to the libel, the property is there stated to be *French* or *Spanish*, or to belong to some other enemy of Great-Britain. If you look into the proof exhibited in that court, it shows it clearly to be the property of Shattuck. |
p. 485 At all events, neither the record, nor the proceedings in Jamaica, show it to be *American property, violating the laws of the United States*, which is the only case that could justify the capture by Maley. If it was *Spanish* property, he had no right to touch it. If it was a *French* vessel, unless *armed*, he had no right to seize it. So that if the sentence is conclusive evidence, it is as conclusive against Maley as it is against Shattuck.

But it is said he ought to have prosecuted his appeal; and, not having done so, he has been guilty of negligence. So far from this is the truth, that he was not bound to resort at all to the British captors. It was the duty of Maley, or the United States, to resort to them. *His* remedy was against Maley. He was not bound to look further. It can be no ground of a charge of negligence to say, that he has done more than he was bound to do.

2. Was there probable cause?

On this point too the case of the *Charming Betsey* is conclusive. The grounds of suspicion in this case are not so strong as they were in that.

But probable cause is no ground on which to deny restitution of the thing itself, or its value. It only excuses from damages for the *tort*. It is no bar to a reimbursement of actual loss. Shattuck asks only for restitution and expenses ; and this is the least that a friendly nation ought to give.

3. As to the items in the statement of the value, and expenses, which have been excepted against.

All the outfits of the vessel, and expenses of shipping the cargo, together with the outward duties, in addition to the first cost, constituted the value of the vessel and cargo, at the time of seizure, and ought to be allowed. The premium of insurance also was a proper charge. For, although no insurance was actually made, yet Shattuck was to be considered in the light of his own insurer, and the risk was worth the premium. | There is evidence in the record that it is a customary charge in such p. 486 cases.

Argument, in reply. This case is not like that of the *Charming Betsey*. In that case the loss was produced by *captain Murray's own act.* But in this, the loss is not the immediate effect of the act of Maley, but of the commander of the British privateer, who is liable to Shattuck for the injury he has sustained. To convert an originally lawful act into a trespass, by subsequent misconduct, that misconduct must proceed from the *party himself*, and not from the act of *another*, whose conduct he cannot controul.

In the case of the *Charming Betsey*, the court decided in express terms, that '*her papers were perfectly correct.*' In the present case, some of the papers were false and delusive, and others were not shown, or were not found.

The sentence in Jamaica is conclusive evidence that the property was not *neutral Danish property*, which is the very ground of the present libel. Unless, therefore, the admiralty court of one nation can reverse the sentence of an admiralty court of another nation, that sentence in Jamaica is conclusive against Shattuck's title. If he had prosecuted his appeal, and reversed the sentence, he would have obtained indemnification. By his instructions from his government, Maley was bound to act on *reasonable suspicion.* They gave him notice of the practice of covering this illicit trade with the *Danish* flag. When, therefore, he found a recent sale of an American vessel to a person pretending to have become a Danish subject, and residing in a place notorious for its abuse of its neutral flag—when he found the vessel attempting to enter a prohibited port, with an ostensible destination to a port not prohibited—when no evidence was exhibited to show that the master of that vessel was a Danish subject—and when his instructions required him '*to be vigilant*, that vessels really American, but *covered* by *Danish* papers, and bound to or from French

p. 487 ports, do not escape | you,' how is it possible to say that he had not '*reason to suspect?*'

Although any one of these circumstances alone might not afford '*reason to suspect,*' yet the combination of the whole certainly did.

With respect to the claim of *insurance*, the case of the *Charming Betsey* is full in point. It is admitted that no insurance has been paid. And the court in that case expressly said, that ' a public officer, entrusted on the high seas, to perform a duty deemed necessary by his country, and executing, according to the best of his judgment, the orders he has received, if he is the victim of any mistake he commits, ought certainly never to be assessed with *vindictive* or *speculative* damages.' The claim for insurance not paid is certainly a claim of speculative damages. The direction of the court to the assessors was, ' to take the prime cost of the cargo and vessel, with interest thereon, including the insurance *actually paid.*'

The consideration of the other items is submitted to the consideration of the court.

March 3.

MARSHALL, Ch. J. delivered the opinion of the court.

In this case each party has appealed from the sentence of the circuit court. Maley complains of that sentence because it subjects him to damages and costs for the value of the Mercator and her cargo, first captured by him, and afterwards taken out of his possession by a British privateer, and because, also, some items are admitted into the account, taken for the purpose of ascertaining the sum, for which he is liable, which ought to be excluded from it. Shattuck complains of the sentence because he was not allowed by the circuit court, all the items contained in the report, to the whole of which, he thinks himself entitled. |

p. 488 In discussing the right of Shattuck to compensation for the Mercator and her cargo, the first question which presents itself is, was that vessel and cargo really his property ?

Without reciting the various documents filed in the cause, it will be admitted that they demonstrate the affirmative of this question, unless the court be precluded from looking into them by the sentence in Jamaica, condemning the ship and cargo as lawful prize.

On the conclusiveness of the sentence of a foreign court of admiralty, it is not intended now to decide.—For the present, therefore, such sentence will be considered as conclusive, to the same extent which is allowed to it in the courts of Great Britain. But, in those courts, it has never been supposed to evidence more than its own correctness ; it has consequently never been supposed to establish any particular fact, without which the sentence may have been rightly pronounced. If then, in the present case, the Mercator, with her cargo, may have been condemned

as prize, although in fact they were both known to be the property of a neutral, the sentence of condemnation does not negative the averment that they both belonged to Jared Shattuck.

It is well known that a vessel libelled as enemy's property is condemned as prize, if she act in such manner as to forfeit the protection to which she is entitled by her neutral character. If, for example, a search be resisted, or an attempt be made to enter a blockaded port, the laws of war, as exercised by belligerents, authorise a condemnation as enemy's property, however clearly it may be proved that the vessel is, in truth, the vessel of a friend. Of consequence, this sentence, being only conclusive as to its own correctness, leaves the fact of real title open to investigation. This positive impediment to inquiry being removed, no doubt upon the subject can be entertained.

It being proved that the Mercator and her cargo belonged to Jared Shattuck, who, though born in the United States, had removed to the island of St. Thomas, | and had acquired all the commercial rights of his p. 489
domicil before the occurrence of those circumstances which occasioned the acts of congress, under which this seizure is alleged to have been made, the case of the Charming Betsey determines that the vessel and cargo were not liable to forfeiture under those acts.

It remains, then, to inquire whether the Mercator appeared under such circumstances of suspicion as to justify her seizure.

On this point, too, the authority of the Charming Betsey appears to be decisive. In each case the vessel was built in America, and had been recently sold to a person born in the United States, who had become a Danish burgher before the rupture between this country and France; and both cases present the same circumstances of suspicion, derived from the practice of the island to cover American as Danish property.—The points of dissimilitude are, that in the Charming Betsey the captain and crew were of a description to give greater suspicion than the captain and crew of the Mercator; and in the Charming Betsey was found a *proces verbal*, which stated facts unfavourable to that vessel, whereas no similar paper was found in the Mercator. The only circumstance of suspicion attending the Mercator, which did not belong to the Charming Betsey, is that she was bound to Port-au-Prince, and was taken entering the port of *Jacmel*. This circumstance appears to be sufficiently accounted for, but if it was not, the court can perceive in it no evidence of her being American property which can weigh against the testimony offered by the papers that she was Danish. The documents on this point which were thought decisive in the case of the Charming Betsey, exist in this case also. The information of the captain, uncontradicted by any of his crew, in this case, as in that, is corroborated and confirmed by the documents on board the vessel.

The only paper, the absence of which could be important, was an authenticated burgher's brief proving the captain to have been a Danish
p. 490 subject. How far | the absence of this paper might have justified a suspicion in a belligerent that she was enemy-property, so as to excuse from damages for capture and detention, according to the usages of belligerents, the court will not undertake to determine; but it was a casualty which is not sufficient to justify a suspicion that the vessel was American. The burgher's brief is stated to have been in possession of the captain; but is supposed not to have been produced, and consequently it could have no influence on lieutenant Maley. However this may be, no inquiry respecting it was made, and he does not appear to have suggested any difficulty on that ground.

Unquestionably lieutenant Maley had a right to stop and to search the Mercator, and to exercise his judgment on the propriety of detaining her; but, in the exercise of that judgment, he appears to have come to a decision not warranted by the testimony presented to him. The circumstances of suspicion arising in the case, were not sufficiently strong to justify the seizure which was made.

But it is obvious, that lieutenant Maley suspected the Mercator to be a French, not an American vessel.

In his answer he says, that he mistook the captain for a *Frenchman;* in his letter of instructions, he speaks of the vessel as a prize; and in the protest of the American prize-master, she is denominated '*a French prize.*' From these circumstances combined, it is supposed to be sufficiently apparent, that the mistake committed by lieutenant Maley, was in supposing the Mercator to be a *French* vessel liable to capture under the laws of the United States.

The argument of the attorney general, that lieutenant Maley is not liable for this loss, because it was produced by a superior force, which it was not in his power to resist, would have great weight, if the circumstances under which the Mercator appeared had been such as to justify her seizure. But the court is not of that opinion, and consequently that argument loses its application to this case. |

p. 491 Neither is it conceived that the failure of Shattuck to appeal in time, destroys his claim on lieutenant Maley. He had certainly a right to abandon if he chose to do so, and to resort to the captor for damages.

In the opinion given in the circuit court, that the libellant was entitled to compensation for the Mercator and her cargo, this court can perceive no error: but in so much of the report of the commissioners appointed to adjust the account as is affirmed, some unimportant inaccuracies appear.

In its circumstances, this case so strongly resembles that of the

Charming Betsey, that the court will be governed by the rule there laid down. In pursuance of that rule, the rejection of the premium for insurance, *that premium not having been paid*, is approved ; but the rejection of the claim for outfits of the vessel, and the necessary advance to the crew is disapproved.—Although the general terms used in the case of the Charming Betsey would seem to exclude this item from the account, yet the particular question was not under the consideration of the court, and it is conceived to stand on the same principles with the premium of insurance if actually paid, which was expressly allowed. But this claim is nearly balanced by two items in the account which were admitted, as this court thinks, improperly.

One is the charge of 540 dollars for the expense of soliciting compensation from the United States. The court can perceive no reason for charging this expense to lieutenant Maley.

The other is the charge of 326 dollars and twelve cents, the account of Ross and Hall, for expenses in England.

Had the appeal been prosecuted in time by Shattuck, it is scarcely possible to doubt, but that the sentence of the court, in Jamaica, would have been reversed, in which case it would have been reasonable, that the expense of the prosecution should have been paid by Lieutenant Maley. But as it was not prosecuted in time, in consequence of which, the proceeds of the vessel and | cargo were lost, it is not conceived, that lieutenant p. 492
Maley ought to be charged with the costs of a subsequent ineffectual attempt, not made at his instance, to repair the original neglect.

What may be the claim of Shattuck, on the government of the United States, for this sum, is not for this court to inquire ; but his claim against lieutenant Maley is not admitted.

This court affirms so much of the sentence of the circuit court, as awards compensation for the Mercator and her cargo, to the libellant, and approves of the sentence on the report of the commissioners, except as to that part which rejects the claim for advances for the outfits of the vessel, and the wages of the crew, and which admits the charges of 540 dollars, on account of the expenses attending the application to the government of the United States, and of 326 dollars and twelve cents, on account of expenses attendant on the ineffectual attempt which was made to prosecute an appeal in England. In these respects, the account is to be reformed, for which purpose, so much of the sentence of the circuit court, as respects this part of the subject, is reversed, and the case is remanded to the circuit court to be further proceeded in, as to justice shall appertain.

Jennings v. Carson.

(4 Cranch, 2) 1807.

The owner of a privateer capturing neutral property, is not liable to a decree of restitution, unless the property, or its proceeds, came to his hands.

The district courts of the United States are courts of *prize;* and have power to carry into effect the sentences of the old continental courts of appeals in prize causes.

In all proceedings *in rem*, the court has a right to order the *thing* to be taken into custody of the law; and it is to be presumed to be in custody of the law, unless the contrary appears.

The *thing* does not follow the appeal into the superior court, but remains in the court below, which has a right to order it to be sold, if perishable, notwithstanding the appeal.

THIS was an appeal from the sentence of the circuit court for the district of Pennsylvania, in a *cause civil and maritime*, in which *Jennings* was the *libellant*, and *Carson* the *respondent;* the former claiming to be owner of the sloop *George* and cargo, captured, in the year 1778, by the American privateer *Addition*, commanded by Moses Griffin, of which the respondent, Carson, was *part owner*, and which was libelled and condemned, on the 31st of October, 1778, as lawful prize, by the court of admiralty for the state of New-Jersey; from which sentence of condemnation there was an appeal to the continental court of appeals, established under authority of the old congress, where the sentence of condemnation was, on the 23d of December, 1780, reversed, and restitution ordered, but never obtained. In the mean time, however, the vessel and cargo had been sold by the marshal of the state court of admiralty, for paper money, under an order of the court contained in the sentence of condemnation, and it did not appear what had been done with that money. No measures were taken to enforce the decree of restitution during the old confederation.

On the 19th of May, 1790, after the adoption of the present constitution of the United States, Jennings filed his libel in the district court for the district of Pennsylvania, alleging that he was a subject of the States
p. 3 General of the United Provinces, an inhabitant and domiciled at the island of St. Eustatius, and owner of the sloop George and her cargo, at the time of capture bound to the port of Egg-Harbour in the United States, and consigned to A. and G. Caldwell; in the prosecution of which voyage she was illegally captured by the privateer *Addition*, owned in part by the respondent, *Carson*, and praying process for arresting Carson, to answer, &c. A supplemental libel was filed, setting forth the proceedings against the vessel in the court of admiralty of New-Jersey; the sentence of condemnation; the appeal; the reversal of that sentence, and the order of restitution.

Neither the original nor supplemental libel prayed any specific or general relief, other than process for arresting Carson, so that he should

appear to answer the libellant ' in his said complaint, of the *wrongs* and *injuries* aforesaid, according to the resolutions of the continental congress, the laws of the United States, and of the commonwealth of Pennsylvania, and the laws and usages of nations in this behalf practised, used, and established.'

Carson, being taken upon the writ of arrest, appeared and filed his plea and answer, averring the sloop George to have been the property of a subject of the king of Great Britain, at the time of capture, and employed in carrying goods to the British army and navy ; that the goods were imported directly or indirectly from Great Britain or Ireland, contrary to the regulations of congress and the law of nations ; the king of Great Britain then being at war with the United States.

It admits that Carson was the owner of one-third of the privateer. It admits the capture, the condemnation, and sale, the appeal and reversal, and the order of restitution, *but denies that any part of the proceeds of the sale ever came to the hands of the owners of the privateer, or either of them, but remained in the hands of the marshal of the court of admiralty of New-Jersey, who alone is answerable for the same.* It avers, that Griffin, the commander of the privateer, had probable cause for | making the capture, p. 4
and therefore the owners are not liable.

It denies the jurisdiction of the district court of Pennsylvania to take cognizance of the question, the same belonging exclusively to the court of admiralty of the state of New-Jersey, and to the court of appeals established by the continental congress. It denies the jurisdiction of the court as a *prize court* in any case, and especially in cases of capture made during the British war, and avers that it has no authority to carry into effect a decree of either of those courts established under the old government.

After filing his plea and answer, Carson died, and Jennings filed a petition, suggesting the death of Carson, *and charging his executors with assets*, and praying that the suit may stand revived against them ; upon which a citation issued, and the executors appeared and answered generally by a reference to the answer and plea of their testator, and further *pleaded*, that by the law maritime, the law of the land, and the laws and ordinances of the United States, they, as executors, are not liable to be proceeded against in that court for the several matters set forth in the libel, for that they are not answerable for the *wrongs* and *offences*, or the pretended wrongs and offences of their testator ; and also, for that *courts maritime* have not authority to intermeddle with the estates and effects, real or personal, of deceased persons, or to give relief against the same, or to seize or take the same effects or estates in execution, or to imprison the bodies of executors for the default of the testator.

To these pleas and answers there were general replications.

On the 30th of March, 1792, the judge of the district court gave an opinion in favour of its jurisdiction in general cases as a *prize* court; but on the 21st of September, 1793, he dismissed the libel, on the ground that the district court was not competent to compel the execution of
p. 5 a decree of the late continental court of | appeals.[1] This sentence was

[1] The following learned opinion of the Hon. Judge Peters, upon the *prize* jurisdiction of the district courts of the United States, is too important to be omitted.

'This is a case in which the general principles are stated in the proceedings and exhibits, and, therefore, will appear clear enough by the perusal of them. There are some circumstances, however, not clearly ascertained by those exhibits, which I shall have occasion to mention, in the course of the observations which I shall make on the merits hereafter. The libel complains of the illegal capture of the sloop George, whereof Robert Smith was master, and her cargo, the property of the libellant, then and now a subject of Holland, during the late war, viz. in July, 1778, by the schooner privateer *Addition*, *Moses Griffin* commander, belonging to the testator, *Joseph Carson*, and others, who are named in the answer of *Joseph Carson*, in his life-time.

'It is alleged, on the part of the respondents, that the vessel captured was employed in carrying goods belonging to the subjects of Great Britain, contrary to the regulations and laws of the then congress. They rely on the libel and condemnation in the state court of admiralty of New-Jersey—the verdict of the jury ascertaining the facts, and the condemnation by the court and order of sale, and for payment of the net proceeds to the captors.

'The sale of the vessel and cargo at vendue, and the monies being received by the marshal of the court, in whose hands it is said they now remain in depreciated paper, not having been distributed to and among the captors, and of course the respondents, or their testator, received no part thereof, and therefore they allege that the marshal only is chargeable to the libellant, and not the respondents or the testator. They insist that there was probable cause of seizure, and therefore the captors are not answerable in damages. They also plead in abatement to the jurisdiction of the court, because they assert that the subject of prize or no prize belongs to the admiralty of New-Jersey, and not to this court, which has no cognizance of the question; nor has it power to effectuate its judgment against executors. On the part of the executors particularly, an answer was put in denying their being chargeable for the *torts* of the testator, which, as well as their consequences, die with his person. But on an explanation on the behalf of the libellant, that he claimed no damages for the *tort*, merely as a *tort*, but sought for restitution of his property only, the point was abandoned by the advocates for the respondents.

'The libellant, to repel this defence, and denying, in the usual form, the facts as stated, sets forth the reversal of the judgment of the court of New-Jersey, by the decree of the court of appeals of the United States, the 23d of December, 1780, which contains a direction to the latter court to make restitution of the property, with costs, but not damages. They also join issue on the point of jurisdiction, and distinguish between a suit commenced in the life-time of the testator, and one brought in the first instance against the executors.

'*Five* points were made by the advocates of the respondents; 1. The *tort* dying with the person. 2d. The jurisdiction of this court is not competent, *as it is not a prize court*. 3d. and 4th. If a prize court, yet, as the cause originally attached in the court of New-Jersey, that was the only court in which the *consequences* were cognizable, and alone competent to effectuate the decree of the court of appeals. 5th. A capture with probable cause is not a subject of action for damages.

'The first point being waived, brings the question to the competency of jurisdiction, which in order, as well as necessity, should be the first point considered, because, if the court has no jurisdiction, it is nugatory to inquire into the merits of the cause. On this point, as it first struck me, I confess I had doubts. The account given by Lord Mansfield of the arrangement of the court of admiralty in England, as detailed in the case of *Lindo & Rodney*, produced hesitation, and my respect for the opinion of that great character, as well as the arguments of the advocates in the present cause, induced a deliberate consideration of the subject. The division of the court of admiralty into two sides, *prize* and *instance*, was new to me, and it is allowed not to have been *generally* known, if at all, by the common

affirmed in the circuit court on the 11th of April, 1798, but was reversed by *this* court at February term, 1799, so far as the same | decreed that the p. 6

lawyers in England, before that case was determined. In this country it never was known, nor does it appear that any new commission was ever transmitted to the colonial judge of the admiralty from Great Britain before the revolution, in cases of wars between that kingdom and its enemies. I have traced from records and other authentic information, the proceedings of the admiralty court of Pennsylvania, for a period exceeding fifty years, and I have the best reason for believing that the practice in other colonies was similar. In all the proceedings, the *prize* suits are called suits *civil* and *maritime*. During the late war, when we assumed and effected our independence, the proceedings were unaltered in this point. I do not find that there is any such distinction in any other nation, except it should be found in Holland, and of this I much doubt. The authority out of Bynkershoek, (177.) produced by one of the advocates for the respondents, founded on an ordinance of the Earl of Leicester, shows that there is a court there whose authority is entirely confined to captures as prize, and it has no jurisdiction even of other maritime cases. This, therefore, is not applicable to a question concerning the powers of a court of *admiralty*, which is allowed, even in the case of *Lindo & Rodney*, to possess jurisdiction in all maritime causes, though in England it is said to act under a peculiar (and therefore not generally known) organization. I take it, therefore, for granted, because the contrary has not been shown, that in England alone are these distinct branches of the same court to be found. In all the books of reports in which cases of prohibitions to the admiralty are mentioned, precedent to the case of *Lindo & Rodney*, these prohibitions are moved for and granted generally to *the court of admiralty;* and though in a case in *Term Reports*, (long after the case of *Lindo & Rodney*,) the distinction is taken, and the prohibitions moved for to the *prize* court, this very instance shows it to be a novelty in the common law books there, for if it had been known as an old practice, the particular designation of the *prize court* would have been unnecessary, and the prohibition would have been required to the *admiralty generally*, as it ever had been in former cases.

'Acting, as we now do, in a national, and not a dependent capacity, I cannot conceive that we are bound to follow the practice in England, more than that of our own or any other nation. Customs purely colonial, were parts of our laws, even in the time of our connection with Britain. I need instance only one, viz. that of the mode of conveyance of *feme-coverts'* estates, contrary to the laws of England. This is a case at common law, in which we then were and now are particularly called to follow their rule and practice, in general. The admiralty proceeds by a law which considers all nations as one community, and should not be tied down to the precedent of one nation, though it were more clearly ascertained. I shall, therefore, conclude, that if the powers of an *admiralty* and *maritime court* are delegated by congress to this court, those of a *prize* court are mixed in the mass of authority with which it is invested, and require no particular specification. They are called forth (if generally delegated) by the occasion, and not by repeated and new interferences of government. Nor do I believe that *even* in *England*, any new authority is vested, though a kind of legal and solemn notice is given of a war, in which subjects for the prize authority of the admiralty may occur. It does not begin with their wars, but was pre-existent. It does not end with the commencement of peace, for their books show it to be exercised at any time afterwards. Government never interferes to put an end to it; how then can its power be repeatedly necessary to begin it? The fact is, it is inherent in a court of admiralty, and not lost, but torpid, like other authorities of the court, when there are no occasions for their exercise.

'But here the question arises, have congress, by their judiciary laws, vested this court with *general* or *special* admiralty powers? Congress have authority (delegated by the people in the constitution) in "all cases of admiralty and maritime jurisdiction." The words of that part of the judiciary law affecting this subject, in which the authorities of the court are described will be seen in the 9th section of that law. "It shall also have exclusive original cognizance of all *civil causes of admiralty and maritime jurisdiction*, including seizures under laws of impost, navigation, or trade of the United States." It is said *prize* or *no prize* is a question of *military*, not of a *civil* nature. But I find no such distinction in the books. Blackstone, in his division of courts, does not class that of the admiralty as a *military*, but a *maritime* court, and it will appear that the jurisdiction of prize is within its powers, though he points out, in cases of prizes in the then colonies, that appeals were to members

district court had not jurisdiction to carry into effect the decree of the court of appeals, and the cause was remanded to the district court for
p. 7 further | proceedings ; the respondent being at liberty to contend before that court, as matter of defence to the merits, or to the form of proceedings,
p. 8 that the libel should first | have been filed in the *district* court of *New-Jersey*, but not to make the decision of the judge on that point a ground of excepting to the jurisdiction of the district court of *Pennsylvania*, and that costs should await the event of the cause. |

p. 9 Upon the second hearing of the cause, on the 2d of April, 1802, the judge decreed in favour of the libellant, for the amount of sales of the sloop and cargo, reduced by the scale of depreciation, with interest until two months after the order of restitution by the court of appeals ; and from the time of the institution of the present suit until the day of final decree ; which decree was, on the 10th of May, 1804, reversed by the circuit court, *and the libel dismissed with costs*.—From which sentence, the libellant appealed to this court.

E. Tilghman, for appellant.

No delay can be imputed to the appellant. There was no limitation by law. The federal court of appeals was unpopular in those states who were attached to the trial by jury, and its jurisdiction was opposed with great warmth. He cited the case of the *sloop Active*, and *Mr. Olm-*

of the privy council, and others, in consequence of treaties and domestic arrangements. But he says "the original court to which this question is permitted in England, is the *court* of *admiralty*," without any distinction as to the nature of its powers, whether *instance* or *prize*, *military* or *civil*. In *Book* 3. *p.* 108. he mentions the exclusive and undisturbed jurisdiction of the courts of admiralty, in cases of prize ; and that court determines, not according to *British laws* or *practice*, but "according to the law of nations." Should I confine my attention merely to the inquiry whether this could be classed under the description of a "*civil cause*," I should think there were grounds to support the idea of its being comprehended. In the case of *Acheson & Everett*, (*Cowp.* 382.) some light is thrown on this view of the subject, because it appears that a *civil* suit may, in substance, but not in form, partake of *criminal* ingredients. So, by parity of reason, may a *civil cause of admiralty and maritime* jurisdiction, be mixed with, or grounded on, transactions of a *military* nature. But I do not think it necessary merely to fix this point. What is, perhaps, of most consequence, is to ascertain the intention of congress in distributing a power, clearly in *them*, to their judiciary departments. And what was said by one of the advocates for the libellant, strikes me as being just and proper, viz. that the construction should be made from a consideration of all the laws on the subject, *in pari materia*. "The court shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including," &c.—that is, being invested with criminal powers in certain cases, it shall also have *civil powers*, as *opposed to criminal*, in admiralty and maritime cases. By recurring to the 12th, 13th, 19th, 21st, and 30th sections of the judiciary law, it will appear that congress meant to convey all the powers, (and in the words of the constitution,) as *they* possessed them in admiralty cases ; and actions or suits in these cases can originate only in the *district courts*.

'For the foregoing reasons, and some others which might be added, I am of opinion that this court possesses *all the powers of a court of admiralty*, and that *the question of prize* is cognizable before it. I have gone thus far into the discussion of this point, because I believe it is the first time it has been agitated in a federal court.

'I do, therefore, decree, adjudge and determine, that the plea to the jurisdiction of the court, as not being competent to determine on prize questions, be, and the same is hereby overruled.'

stead's case, and an act of the legislature of Pennsylvania in support of that assertion. The jurisdiction of that court was not finally settled, until the case of *Doane & Penhallow*, 3 *Dallas*, 54. 85, 86.

He considered the case under six heads.

1. That if the appellant was entitled to redress, he was right in applying to the *district court of Pennsylvania*, and was not obliged to resort to that of *New-Jersey*.

2. That if his suit was rightly commenced in the district court of Pennsylvania, that court had authority to decide finally on the case.

3. That the district court has jurisdiction of the question of *prize*.

4. That, if the appellant is entitled to redress, his remedy survives against the executors of Carson.

5. That it is immaterial whether there was or was *not* probable cause for the capture. |

6. That the *owners* of the privateer are answerable for the acts of the p. 10
captors, their agents.

1. As to the first point.

One court of admiralty is competent to carry into effect the sentence of another; even of a foreign court, and *a fortiori* of a domestic court. *Douglass*, 1. *Walker* v. *Witter*. 1 *Vent*. 32. *Jurado* v. *Gregory*. 1 *Lev*. 267. S. C. 6 *Vin*. 535. *pl*. 20. 1 *Salk*. 32. *Broom's case*. *Carth*. 398. S. C. 2 *Lord Raym*. 935. *Ewer* v. *Jones*. 3 *Dall*. 97. and 118. *Penhallow* v. *Doane*. 2 *Browne's Civ. & Ad. Law*, 120.

The sentence of the court of appeals consists of three parts. 1st. Restitution. 2d. Costs. 3d. An order to the court below to carry the sentence into effect.

The sentence was for restitution of the *thing itself*, not of its value; nor of the amount for which it was sold. The appellant was not obliged to take any thing in lieu of the thing itself.

If a judgment at common law is rendered against a plaintiff in the circuit court, and that judgment reversed in the supreme court, and a mandate issues to the circuit court to execute the judgment of the supreme court, the plaintiff is not bound to take out his execution under the mandate, but may bring an action of debt upon the judgment, in any district of the United States where the defendant may be found. So in this case, the claimant may libel the captors in any district where they may be found. We are not bound to take the proceeds of the sale in continental money. The reversal was on the 23d of December, in the year 1780, when paper money was a mere *ghost*, and worth nothing. It is immaterial what became of the money, and whether it sunk in the hands of the marshal, or not. If our cargo had been suffered to arrive, we might have sold it so as to avoid the effect of depreciation.

The resolution of congress, which provides that captured vessels

p. 11 should be libelled in the district into which | they should be brought, applies only to libels *by the captors* against the *property*, and not to libels *by the claimant against the captors*. These, *ex necessitate*, must be brought where the captors may be found. We cannot now proceed in the original court of admiralty of New-Jersey, for it does not exist. It was a court deriving its authority from the state of New-Jersey alone. By the constitution, *all admiralty powers* are now vested in the *courts of the United States*, and to those only can we now apply.

2. If the suit was rightly commenced in the district court of Pennsylvania, that court had authority to decide finally on the case.

The words of the decree of restitution are all powerful—'*the vessel and cargo* SHALL BE *restored*.' We are therefore entitled to the thing itself, or its *full* value.

If it be objected that the loss by depreciation is not chargeable to the respondents, we say that it is a fundamental rule that he who does the first wrong shall be liable to *all* the damages.

The act of the marshal was the act of the captors. His sale, made after the appeal, was or was not regular. If regular, the proceeds were received to the use of the captors; if irregular, although under the order of the court, the captors are liable. 12 *Mod.* 639. *Roswell* v. *Prior.* 5 *Vin. Ab.* 405. 1 *Vernon*, 297—307. *Childerns* v. *Saxby.* 6 *Mod.* 179. *Regina* v. *Tracy.*

At common law, if the judgment be reversed after goods sold under a *fi. fa.* the writ of restitution is to the plaintiff, and not to the officer; and the plaintiff must answer the *value*, not what they actually sold for. 2 *Salk.* 588. *Cro. Eliz.* 209. *Rook* v. *Wilmot.* 390. *Atkinson* v. *Atkinson.* 11 *Mod.* 36. *Clerk* v. *Withers.* *Vin. Ab. Tit. Distress*, 171. *pl.* 1, 2. *Bro. Ab. Distress*, *pl.* 72.

The sentence of the court of appeals is conclusive that the capture was wrongful. It was a marine trespass. If the sloop had been taken by the British out of the hands of the captors, they would still have been
p. 12 liable. | 1 *Dall.* 95. *Talbot's Case.* 3 *Dall.* 333. *Del Col* v. *Arnold.* 3 *T. R.* 333. *in notis*, *Livingston and Welch* v. *M'Kenzie.*

3. The third point, viz. that the district courts of the United States have jurisdiction in questions of *prize*, was admitted by the opposite counsel.

4. If the libellant is entitled to redress, his remedy survives against the executors of the owners of the capturing vessel.

The decree of the court of appeals is for *restitution only*, and the prayer of the libellant is for general relief, which is in all cases sufficient. 3 *Dall.* 86, 87. 107. 118. *Penhallow* v. *Doane.*

It is a rule in the civil law, that if the ancestor has appeared to the suit, the heir will be liable, and it is a maxim in equity that the heir shall

be liable, even in cases of *tort*. *Domat.* 605. 607, 608, 609. *Cowper*, 374. 376. *Hambly* v. *Trott*. *Grotius*, *b.* 2. *c.* 21. *s.* 19, 20. *Vinnius*, 785. 787.

5. To support his fifth position, that it is immaterial whether there were probable cause or not, he relied upon the case of *Del Col* v. *Arnold*, 3 *Dall.* 333.

6. That the owners of the capturing vessel are liable for the acts of the captors. In support of this position he cited 4 *Rob. Rep.* 293. *The Picimento*. 292. *The Venus*. 1 *Dall.* 108. 3 *Dall.* 334. 3 *Dall. Penhallow* v. *Doane*.

Lewis, on the same side, offered to read authorities to show that the appeal not only suspended the sentence, but the order to sell, unless a special power was given to the court to proceed to sell notwithstanding the appeal.

Hare, contra, contended,

1. That the district court of Pennsylvania had not jurisdiction. |

2. That the case of the libellant was void of merit. p. 13

1. If the proceeding is not against the *prize itself*, nor the *proceeds* of the sale of the prize, nor against the *persons of the captors*, a prize court has no jurisdiction. No case can be produced, where a prize court has taken jurisdiction merely against the *persons of the owners* of the capturing vessel. It is even doubted whether a court of admiralty could entertain a suit against the *proceeds* in the hands of the agent of the captors. 'Proceedings upon prize are proceedings *in rem*; and it is presumed that the body and substance of the thing is in the country which has to exercise the jurisdiction.' 1 *Rob. Amer. Ed.* 119. *The Flad Oyen*.

The jurisdiction of a court of vice-admiralty extends only to things brought within its authority. 3 *Rob.* 53. *The Carel and Magdalena*.

The sentence of the court of appeals required the court of admiralty of New-Jersey to cause restitution to be made. If the former sentence in New-Jersey is complete, it is a bar to a subsequent suit. If it is *not* complete, but is still pending, it is equally a bar. 3 *Bac. Ab.* 653. *Prec. Chan.* 579.

2d. As to the question of merits. Upon this subject the case of *The Mentor*, 1 *Rob.* 151—153. is in point. This also is an *antiquated claim*, and not prosecuted against the actual wrong doer, but against persons who were not present at the act complained of. Besides, there was probable cause, and therefore no damages can be given. 1 *Rob.* 82. *The Betsey*. The sloop had sailed under a British convoy; this was a strong ground of suspicion, and, added to the false account of her destination, her want of papers, and the destruction of papers, was sufficient ground to excuse from damages and costs. 3 *T. R.* 332. *Smart* v. *Wolf*. 1 *N. Y. Term Rep.* 64. *Jenks* v. *Hallet*. *Doug.* 581. *Bernardi* v. *Motteux*. 1 *Marshall*, 317. The sentence of the court of admiralty of New-Jersey is of

itself conclusive evidence of probable cause. 1 *Wilson*, 232. *Reynolds* v. *Kennedy*. |

p. 14 The sale was the act of the court, and not of the party.

The case of sale under a distress is not analogous; it is the act of the party alone. It is not under the judgment of a court. The sale produced a fund to which alone the libellant can resort. If a collateral security be given, and if that be lost by the *laches* of the party, he shall never recover.

From the date of the reversal of the decree, the marshal held the money to the use of the present libellant.

The rule of the civil law as to *torts* is the same with the rule of the common law, *actio personalis moritur cum persona.*

The Court stopped *Ingersoll*, on the same side, and said, that the point which it would be difficult to establish on the part of the libellant is, that he would have been entitled to any remedy against the present appellees, even on the very day after the sentence of the court of appeals.

Lewis, in reply.

The sentence of the court of appeals is conclusive evidence of the falsity of the original libel, and that the capture was *tortious*.

That the present libellant is entitled to relief, in *some* form and in *some* court, cannot be questioned. It is not a case of common law jurisdiction, and there is no *state* court of admiralty in New-Jersey. If any court has jurisdiction, it must be a district court of the United States.

Two questions arise in the cause.

1. Is the libel filed in the proper court? and,
2. To what extent is the libellant entitled to relief? |

p. 15 1. A neutral is entitled to restitution; and if the captor will not proceed against the property in a reasonable time, the owner may libel the captors, and pray that they may proceed to adjudication, or restore the property.

The captured property must be considered as in the power and possession of the captors. The sale makes no difference, unless made by *consent*, or because the property was *perishable*, or under some act of congress or other statute law.

The British statutes require that the captured property should be taken into the custody of certain officers of the government or of the court, and thereby might be considered as in the custody of the law; but congress had no such officers; the custody remained with the captors until trial and acquittal or condemnation. *Resolve of Congress of 27th of November*, 1774. If it had been a sentence of acquittal, a writ of restitution would have issued. A mandate would have been vain, unless the court had power to execute the sentence.

JOHNSON, J. inquired of Mr. Lewis whether in his practice he had

known any instance in which, upon filing a libel, a warrant has not issued to take the captured property into the custody of the marshal.

MARSHALL, Ch. J. It is certainly important to ascertain in *whose custody* the property was. I had all along considered it as in the *custody of the law*.

Lewis. I have had an opportunity of knowing a great deal of the admiralty practice during our revolutionary war, being concerned in all the cases in Pennsylvania, and in all the appeals from the state courts. I do not know an instance in which such a warrant has issued. But the records of the court of appeals are in the office of the clerk of this court. In this very case there was no such warrant.

LIVINGSTON, J. It appears that the sale was made by the marshal under the order of the court. Must we not presume that the court knew and did its duty; and that the goods were in a perishing condition? |

Lewis. If the general practice was *not* to issue such a warrant, but p. 16
to suffer the property to remain in the hands of the captors, and no warrant appears in this record, which ought to be presumed to contain *all* the proceedings in the case, the presumption is that no such warrant ever was issued; especially if such warrant was not rendered necessary by the law.

There was no writ or warrant of sale from the court to the marshal. The order of sale is embodied in the final decree itself. It was made before the appeal, and while the court had the power to make such an order.

But the appeal suspended both the power to condemn and the power to sell. The appeal suspends the sentence as to every purpose whatsoever, unless the power of sale after appeal be given by express law, or unless the goods are in a perishing condition.

The law of New-Jersey which constituted the court, does not relate to the case of appeal, and the act of 18*th December*, 1781, was made to remedy this defect, but that was made *three* years after the sale. In 2 *Roll. Ab.* 233. I. it is said, that 'if, after sentence, the party appeal, the sentence is *altogether* suspended during the appeal.' And *Wood*, in his *Institutes*, *p.* 525. says, 'All acts done after the appeal, in prejudice of the appellant, are to be reversed.' In 2 *Browne's Civil Law*, 437. it is said that an appeal *apud acta* may be necessary to prevent the instant intermeddling of the adversary.

The same law is laid down by *Coke*, 4 *Inst.* 340. Sir *Thomas Parker's Rep.* 70. *Foster* v. *Cockburn*, where upon argument and great deliberation the court of exchequer decided, that their power to order a sale of the goods seized was suspended by a writ of error, it not being sufficiently proved that they were perishable.

Before trial and condemnation, perishable articles may be sold, but in no other case, unless the power be given by statute law. 2 *Browne's*

Civil Law, 227. 229. 446. 450. A special power to sell, notwithstanding an appeal, is given by the British prize acts; but no such power was
p. 17 given to the admiralty court of New-Jersey, | either by the law of that state or the act of congress. 2 *Browne's Civil Law*, 231. 454. If the property was in the custody of *Carson*, he was bound by the sentence of restitution.

As to the question whether the libellant has any remedy against the executors of the owners of the privateer, we say that we claim merely *restitution* in *specie*, or of the value; we claim no damages for the *tort*.

CHASE, J. This is a libel grounded upon the original wrong. The proceedings of the court of admiralty of New-Jersey, and of the continental court of appeals, are brought in only as an exhibit. There is no new relief prayed for.

Lewis. There is a supplemental libel, and the first libel prays for *general relief*. It is the same prayer as in the case of *Penhallow* v. *Doane*. The case in *Cowper*, 74. shows that the remedy extends to executors, where the estate of the testator has been benefited by the *tort*. The case of *Penhallow* v. *Doane* is against the executors of the owner. The libel in the present case was drawn from that precedent.

MARSHALL, Ch. J. The objection is that the libel does not charge that the property has not been restored; nor that it has not been proceeded against; nor that the sentence of the court of appeals has not been carried into effect.

If these allegations had been made in the bill, and there had been a prayer for general relief, your argument would be pertinent. But the libel complains only of the original tortious capture, and claims damages.

There is no allegation that the property was destroyed, or that a wrongful sale had been made.

LIVINGSTON, J. It is strange that the case of *Penhallow* v. *Doane* should be cited by the appellant. The decision in that case is directly against him. The court there gave relief only for the property which actually came to the hands of the respondents. |
p. 18 MARSHALL, Ch. J. observed, that in the case cited from *Cowper*, the property had come to the hands of the executor. The law of that case is not denied by this court.

Lewis. This court is sitting as a court of admiralty proceeding according to the law of nations. No irregularity of form ought to prevent us from obtaining relief according to the case we make out.

As to the question whether the district court of Pennsylvania had cognizance; he observed,

That if the property had been carried first to New-Jersey and then to Pennsylvania, the libel would have been proper in Pennsylvania. So where the libel is against the person, and he is found in Pennsylvania,

the libel must be filed there. The only remedy of the libellant is in the courts of the United States, and the federal district court of New-Jersey is as foreign to the state court of New-Jersey, as the federal district court of Pennsylvania.

Carson was bound by the decree of the court of appeals; and courts of admiralty proceeding according to the law of nations will aid each other in the execution of their sentences. Carson died bound by the decree, and his executors are therefore bound. As they lived in Pennsylvania, we could only sue them there.

As to the extent of the relief, he observed, that the sentence was for *restitution;* and as that sentence was passed with the knowledge that a sale had been made, he inferred that the court of appeals did not intend that the proceeds of the sale only should be paid over, but that there should be an actual restitution of the thing itself, or of its actual value. It is no answer to say that such is the usual form of decree in cases where a sale has been made, because those are precedents where the sale has been lawfully made; but here it was unlawful.

Dallas, on the same side. |

The real question is, who shall bear the loss of the depreciation of p. 19
the money; and this depends upon the question in whose possession was the property at the time of the decree of restitution.

The claimant did no act, and was guilty of no omission which could make that loss fall upon him; but it was a loss produced by the tortious act of the captors, and they are in law answerable for all the consequences.

In England, formerly, all captures were considered as made for the crown. It was only in consequence of the prize acts and proclamations, that the property was adjudged to the captors. But it is now settled that the property vests in the captors immediately upon the capture; 5 *Rob.*[1] and the resolves of the old congress take for granted the same principle. By the law of nations the property is changed by the capture, and the owner has no further power over it. The claimant is really and substantially a defendant through all the forms of proceeding, as well in the original suit as in the present. There was no assent, on his part, to the sale—no acquiescence in any act of the court, or of the marshal. The decree of restitution supposes and implies that the property remained in the hands of the captors. The order for sale was made to carry into effect the decree of condemnation, and for the purpose of distribution, not for the preservation of the property, nor to hold it in custody of the law. No security was given by the captors or by the marshal. No public notice was given of the sale; no such notice was required by the order of sale. The sale was made thirteen days after the order was suspended by the appeal, and the captor was the purchaser.

[1] The case of the *Elsebe*, 5 *Rob.* 173. seems *contra*.

The case was before the court of appeals upon its particular circumstances, as well as upon its general merits; and the fact of the sale after the appeal must have been known to the court. Two years had elapsed since the original sentence. A restitution of the thing itself was impossible; and the form of the decree of reversal must have been a matter in question. If the sale had been regularly and lawfully made, the court of appeals
p. 20 would | have taken notice of it, and have decreed restoration of the proceeds of the sale. 3 *Dall.* 102. 115. 119. *Penhallow* v. *Doane.* It was a fact of which the captor might have availed himself before that court.

But the marshal is to be considered merely as the agent of the captor.

The claimant had no remedy but against the person of the captor. There is no evidence that the proceeds of the sale are any where to be found.

The original libel did not ask for process to arrest the vessel, but merely prayed for condemnation. The possession, and the right of possession, were in the captor. There was no process to attach the vessel. The first process was a *monition* and *venire* for the jury. The marshal could have no right to possession, unless by virtue of process of attachment. There is no order in the whole proceedings which takes the possession from the captor. After the appeal the order of sale was a nullity, and the sale by the marshal was as the agent of the captor, who was a trustee for the claimant, and had no right to sell; and is, therefore, liable for all the consequences.

February 11.

MARSHALL, Ch. J. delivered the opinion of the court.

The privateer *Addition*, cruising under a commission granted by the congress of these United States during the war between this country and Great Britain, captured the sloop George, brought her into port, and libelled her in the court of admiralty for the state of New-Jersey, where she was condemned as lawful prize by a sentence rendered on the 31st of October, 1778, and ordered to be sold by the marshal. From this sentence Richard D. Jennings, the owner, prayed an appeal, which, on the 23d of December, 1780, came on to be heard before the court of appeals constituted by congress, when the sentence of the court of Jersey was reversed, and restitution of the vessel and cargo was awarded. Pend-
p. 21 ing the appeal, on the 13th of November, 1778, the order of sale | was executed, and the proceeds of sale remained in possession of the marshal. It does not appear that any application was ever made to the court of New-Jersey to have execution of the decree of the court of appeals, and this suit is brought to carry it into execution, or on some other principle to recover from the estate of Joseph Carson, who was part owner of the privateer Addition, the value of the George and her cargo.

So far as this bill seeks to carry into effect the decree of the 23d of

December, 1780, there is no doubt of the jurisdiction of the court; but the relief granted can only be commensurate with that decree. It is therefore all essential to the merits of this cause to inquire how far Joseph Carson, the testator of the defendants, was bound by the sentence which this court is asked to carry into effect.

The words under which the plaintiffs claim are those which direct the restoration of the George and her cargo. As the captors are not ordered by name to effect this restoration, and as the order bound those in possession of the subject on which it must be construed to operate, it must be considered as affecting those who could obey it, not those who were not in possession of the thing to be restored, had no power over it, and were, consequently, unable to redeliver it. Had Richard D. Jennings appeared before the court of New-Jersey with this decree in his hand, and demanded its execution, the process of that court would have been directed to those who possessed the thing to be restored, not to those who held no power over it, either in point of fact or law.

This position appears too plain to require the aid of precedent, but if such aid should be looked for, the case of *Doane* v. *Penhallow* unquestionably affords it. In that case a decree of reversal and restitution was satisfied by directing the proceeds of the sales to be paid; and even the judge who tried the cause at the circuit concurred with his brethren in reversing his own judgment, so far as it had decreed joint damages, and had thereby rendered the defendant liable for more than he had received. The case of *Doane* v. *Penhallow*, therefore, which must be considered as expounding the | decree of the court of appeals now under p. 22
consideration, has decided that Joseph Carson was bound to effect restitution by that decree so far only as he was, either in law or in fact, possessed of the George and her cargo, or of the proceeds.

To this point, therefore, the inquiries of the court will be directed.

In prosecuting them it will be necessary to ascertain whether,

1st. The George and her cargo were, previous to the sentence, in the custody of the law, or of the captors.

2d. Whether the court of admiralty, after an appeal from their sentence, possessed the power to sell the vessel and cargo, and to hold the proceeds for the benefit of those having the right.

It appears that the court of New-Jersey, which condemned the George and her cargo as prize, was established in pursuance of the recommendation of congress, and that no legislative act had prescribed its practice or defined its powers. The act produced in court was passed at a subsequent period, and consequently cannot govern the case. But the court cannot admit the correctness of the argument drawn from this act by the counsel for the plaintiffs in error. It cannot be admitted that an act defining the powers and regulating the practice of a pre-existing court, contains

provisions altogether new. The reverse of this proposition is generally true. Such an act may rather be expected to be confirmatory of the practice and of the powers really exercised.

Since we find a court instituted and proceeding to act as a court, without a law defining its practice or its powers, we must suppose it to have exercised its powers in such mode as is employed by other courts instituted for the object, and as is consonant to the general principles on which it must act.

That by the practice of courts of admiralty a vessel when libelled is
p. 23 placed under the absolute controul of the | court, is not controverted; but the plaintiffs contend that this power over the subject is not inherent in a court of admiralty, but is given by statute, and in support of this opinion the prize acts of Great Britain have been referred to, which unquestionably contain regulations on this point. But the court is not of opinion that those acts confer entirely new powers on the courts whose practice they regulate. In Browne's Civil and Admiralty Law, in his chapter on the jurisdiction of the prize courts, it is expressly stated that those courts exercised their jurisdiction anterior to the prize acts, and the same opinion is expressed by Lord Mansfield, in the case of *Lindo* v. *Rodney*, which is cited by Browne. The prize acts, therefore, most probably regulated pre-existing powers in the manner best adapted to the actual circumstances of the time.

It is conceived that the constitution and character of a court of admiralty, and the object it is to effect, will throw much light on this subject.

The proceedings of that court are *in rem*, and their sentences act on the thing itself. They decide who has the right, and they order its delivery to the party having the right. The libellant and the claimant are both actors. They both demand from the court the thing in contest. It would be repugnant to the principles of justice and to the practice of courts to leave the thing in possession of either of the parties, without security, while the contest is depending. If the practice of a court of admiralty should not place the thing in the custody of its officers, it would be essential to justice that security should be demanded of the libellant to have it forthcoming to answer the order of the court.

If the captor should fail to libel the captured vessel, it has been truly stated in argument that the owner may claim her in the court of admiralty. How excessively defective would be the practice of that court, if, on receiving such a claim, it neither took possession of the vessel, nor required security that its sentence should be performed. Between the rights of a claimant where a libel is filed and where it is not filed, no distinction
p. 24 is | perceived, and the court conceives the necessary result of proceedings *in rem* to be that the thing in litigation must be placed in the custody

of the law, and cannot be delivered to either party but on sufficient security.

In conformity with this opinion is the practice of the court of admiralty, not only when sitting for the trial of prizes, and acting in conformity with the directions of positive law, but when sitting as an instance court, and conforming to the original principles of a court of admiralty. In his chapter ' on the practice of the instance court,' under the title of ' proceedings *in rem*,' *p.* 397. Browne states explicitly, that when the proceeding is against a ship, the process commences with a warrant directing the arrest of the ship. In Browne, 405. the course of proceedings against a ship, not for a debt, but to obtain possession, is stated at length, and in that case too the court takes possession of the ship.

It must be supposed that a court of admiralty, having prize jurisdiction, and consequently proceeding *in rem*, and not having its practice precisely regulated by law, would conform to those principles which usually govern courts proceeding *in rem*, and which seem necessarily to belong to the proper exercise of their functions. If in proceeding against a ship to subject her to the payment of a debt, or to acquire the possession of her on account of title, the regular course is that the court takes the vessel into custody and holds her for the party having right, the conclusion seems irresistible, that in proceeding against a ship to condemn her as prize to the captor, or to restore her to the owner who has been ousted of his possession, the court will also take the vessel into custody, and hold her for the party having the right.

This reasoning is illustrated, and its correctness in a great measure confirmed, by the legislation of the United States, and the judicial proceedings of our own country. By the judicial act the district courts are also courts of admiralty, and no law has regulated their practice. Yet they proceed according to the general rules of the admiralty, and a vessel libelled is always in possession of the law. |

An objection, however, to the application of this reasoning to the case p. 25
before the court is drawn from the defectiveness of the record in the original cause, which does not exhibit a warrant to the officer to arrest the George. The first step which appears to have been taken by the court is an order to the marshal to summon a jury for the trial of the case.

The carelessness with which the papers of a court created for the purposes of the war, and which ceased to exist before the institution of this suit, have been kept, may perhaps account for this circumstance. At any rate the court of admiralty must be presumed to have done its duty, and to have been in possession of the thing in contest, if its duty required that possession. The proceedings furnish reasons for considering this as the fact.

The libel does not state the George to have remained in possession

of the captors, that the sale was made for them, or by their means, nor that the proceeds came to their hands. The answer of the defendants avers that on bringing the George into port, she was delivered up with all her papers to the court of admiralty, and, although the answer is not testimony in this respect, yet the nature of the transaction furnishes ample reason to believe that this was the fact ; and it is the duty of the plaintiff to show that the defendants are in a situation to be liable to his claim. If the process of the court of admiralty does not appear regular, this court, not sitting to reverse or affirm their judgment, but to carry a decree of reversal and restoration into effect, must suppose the property to be in the hands of those in whom the law places it, unless the contrary appears. The George and her cargo, therefore, must be considered as being in custody of the law, unless the contrary appears.

If this conclusion be right, it follows that the regularity of the sale is a question of no importance to the defendants, since that sale was the act of a court having legal possession of the thing, and acting on its own authority. |

p. 26 If the reasoning be incorrect, it then becomes necessary to inquire,

2d. Whether the court of New-Jersey, *after an appeal from its sentence*, possessed the power of selling the George and her cargo, and holding the proceeds for the party having the right.

That the British courts possess this power is admitted, but the plaintiffs contend that it is conferred by statute, and is not incident to a prize court.

That the power exists while the cause is depending in court seems not to be denied, and indeed may be proved by the same authority and the same train of reasoning which has already been used to show the right to take possession of the thing whenever proceedings are *in rem*. Browne, in his chapter on the practice of the instance court, shows its regular course to be to decree a sale where the goods are in a perishable condition.

The plaintiffs allege that this power to decree a sale is founded on the possession of the cause, but the court can perceive no ground for such an opinion. It is supported by no principle of analogy, and is repugnant to the reason and nature of the thing.

In cases only where the subject itself is in possession of the court, is the order of sale made. If it be delivered on security to either party, an order of sale pending the cause is unheard of in admiralty proceedings. The motive assigned for the order never is that the court is in possession of the cause, but that the property in possession of the court is in a perishable state. A right to order a sale is for the benefit of all parties, not because the case is depending in that particular court, but because the thing may perish while in its custody, and while neither party can enjoy its use.

If then the principle on which the power of the court to order a sale depends, is not that the cause is depending in court, but that perishable property is in its possession, this principle exists in as much force after as before an appeal. The property does not follow the appeal into the superior | court. It still remains in custody of the officer of that court p. 27
in which it was libelled. The care of its preservation is not altered by the appeal. The duty to preserve it is still the same, and it would seem reasonable that the power consequent on that duty would be also retained.

On the principles of reason, therefore, the court is satisfied that the tribunal whose officer retains possession of the thing retains the power of selling it when in a perishing condition, although the cause may be carried by appeal to a superior court. This opinion is not unsupported by authority.

In his chapter on the practice of the instance court, page 405. Browne says, ' If the ship or goods are in a state of decay, or of a perishable nature, the court is used, during the pendency of a suit, or sometimes after sentence, notwithstanding an appeal, to issue a commission of appraisement and sale, the money to be lodged with the registrar of the court, *in usum jus habentis*.'

This practice does not appear to be established by statute, but to be incident to the jurisdiction of the court, and to grow out of the principles which form its law. A prize court not regulated by particular statute would proceed on the same principles—at least there is the same reason for it.

But there is in this case no distinct order of sale. The order is a part of the sentence from which an appeal was prayed, and is therefore said to be suspended with the residue of that sentence.

The proceedings of the court of admiralty, if they are all before this court, were certainly very irregular, and much of the difficulty of this case arises from that cause ; but as this case stands, it would seem entirely unjust to decree the defendant to pay a heavy sum of money, because the court of admiralty has done irregularly that which it had an unquestionable right to do.

Since the court of admiralty possessed the power of making a distinct order of sale immediately after the appeal was entered, and this, but for the depreciation, would | have been desirable by all, it is not unreasonable p. 28
to suppose the practice to have been to consider the appeal as made from the condemnation, and not from the order of sale. The manner in which this appeal was entered affords some countenance to this opinion. In the recital of the matter appealed from, the condemnation alone, not the order of sale, is stated.

The court will not consider this irregularity of the admiralty, in ordering what was within its power, as charging the owners of the privateer, under the decree of the 23d of December, 1780, with the amount of the sales

of the George and her cargo, which in point of fact never came to their hands, and over which they never possessed a legal controul, for the marshal states himself to hold the net proceeds to the credit of the former owners.

It is therefore the unanimous opinion of this court that the decree of the 23d of December, 1780, does not require that the restoration and redelivery which it orders should be effected by the captors, but by those who in point of law and fact were in possession either of the George and her cargo, or of the money for which they were sold. As the officer of the court of New-Jersey, not the captors, held this possession, the decree operates upon him, not upon them.

On that part of the libel in this case which may be considered as supplemental, and as asking relief in addition to that which was given by the decree of the 23d of December, 1780, the court deems it necessary to make but a very few observations.

The whole argument in favour of this part of the claim is founded on the idea that the captors were wrong doers, and are responsible for all the loss which has been produced by their *tortious* act. The sentence of reversal and restoration is considered by the plaintiffs as conclusive evidence that they were wrong doers.

But the court can by no means assent to this principle. A belligerent cruizer who with probable cause seizes a neutral and takes her into port
p. 29 for adjudication, | and proceeds regularly, is not a wrong doer. The act is not *tortious*. The order of restoration proves that the property was neutral, not that it was taken without probable cause. Indeed, the decree of the court of appeals is in this respect in favour of the captors, since it does not award damages for the capture and detention, nor give costs in the suit below.

If we pass by the decree, and examine the testimony on which it was founded, we cannot hesitate to admit that there was justifiable cause to seize and libel the vessel.

Upon the whole case then, the court is unanimously of opinion that the decree of the circuit court ought to be affirmed.

Sentence affirmed.

Fitzsimmons v. The Newport Insurance Company.

(4 Cranch, 185) 1808.

Persisting in an intention to enter a blockaded port after warning, is not *attempting* to enter it.

Quere, whether a foreign sentence of condemnation be conclusive evidence in an action against the underwriters ?

ERROR to the circuit court of the district of Rhode-Island, in an action upon a policy of insurance on the brig *John*, warranted American property, from *Charleston, South Carolina*, to *Cadiz*, captured by a British ship

of war on the 16th of July, 1800, carried into Gibraltar, and there condemned on the 26th day of August following. The cause of condemnation set forth in the sentence was, that the brig was 'cleared out for *Cadiz*, a port actually blockaded,' and that the master '*persisted in his intention* of entering that port, *after warning* from the blockading force not to do so, *in direct breach and violation of the blockade thereby notified.*' On the trial in the court below the jury found a special verdict, stating, among other things, that the blockade of Cadiz was not known at Charleston when the John sailed from thence, and that the first notice the master had was from the blockading squadron, who *brought to* the brig, and warned the master not to proceed to, nor attempt to enter the port of Cadiz, and indorsed his register; but the master had no notice of such indorsement upon his register until after the condemnation. The mate and some of the seamen were taken out, and a prize master and British seamen put on board. She was detained by the | blockading squadron from the 16th to the 27th p. 186
of July, when the master was ordered on board the admiral's ship, and told, 'we have thoughts of setting you at liberty; and in case we do, and deliver you your vessel and papers, what course will you steer, or what port will you proceed for?' To which the master answered, that in case he got no new orders, he should continue to steer by his old ones. The admiral then said, 'that will be, I suppose, for Cadiz.' To which the master replied, 'certainly, unless I have new orders.' Upon which the admiral said, 'that is sufficient; I shall send you to Gibraltar for adjudication.' Whereupon the brig, *without being liberated*, was sent into Gibraltar, and condemned on the grounds stated in the sentence. The libel and proceedings in the vice admiralty are found by the special verdict. An appeal was prayed and granted from the vice-admiralty court, but it does not appear to have been prosecuted. The judgment in the court below was for the original defendants.

This cause was several times argued, having been pending in this court ever since the year 1803.

It was now argued by *Dallas* and *C. Lee* for the plaintiff in error, and by *Rawle* for the defendants.

Argument for the plaintiff in error.

1. The plaintiff is entitled in the present action to support his claim by the *truth* of the case, in opposition to the *falsehood* of the sentence.

2. The cause expressly assigned for condemning the vessel is not a lawful cause of condemnation, tested by the law of nations, or by the treaty between this country and Great Britain.

I. The question of conclusiveness of a foreign sentence of a court of admiralty, in a case of insurance, has never yet been settled in this court. It is *res integra*.

In a question of principle, and where this court is bound by no authority or precedent, it will take the path which leads to justice. |

p. 187 1st. *How does it stand upon general principles?*

By what principle are we bound to enforce a foreign judgment? Not that of *comity* and reciprocity; for that would often be to sanction gross error and palpable injustice; but upon the principle of *public policy* and *convenience*, and this can extend no further than is necessary to quiet *the title to the thing* acquired under such a sentence. So far as the title to the thing itself is concerned, a foreign sentence must be considered as conclusive, but no further. A foreign municipal judgment, when brought into our courts to be enforced, is only *prima facie* evidence; but when set up as a defence it is conclusive, because it is the decision of that tribunal to which the plaintiff has chosen to resort. It is, therefore, conclusive against him, but not in his favour.

Judgments upon attachments, which change the property of the thing attached, are conclusive as to the title of the thing, but not as to the question of debt between the principal creditor and debtor.

Why should a sentence of condemnation *as prize* be conclusive in a suit for indemnity against *capture?* Public policy is not concerned in the question whether the insurer or the insured should bear the loss.

The underwriter promises indemnity against capture and its effects, if the property be neutral. The assured warrants the *neutrality*, but *not the acquittal* in a foreign prize court. He is bound to sue, labour and travel for the benefit of the underwriter in this case as well as in others. But the loss by capture and condemnation is the very peril insured against; and all the assured is bound to do, is to prove that his property was really neutral; he does not take upon himself the risk of the injustice of foreign *courts*, any more than the injustice of any other department of a foreign government. What is it but the injustice of belligerent nations which makes a difference between a war risk and a peace risk upon neutral property? And what consolation is it to the insured that his property is lost by the injustice of a court, rather than by that of the executive

p. 188 power? All that is required of him is *good faith;* he does not | answer for the good faith of a foreign tribunal; a tribunal too whose decisions are professedly not founded upon the principles of abstract right, but upon the will of the sovereign.

The capture alone gives the right to abandon, and consequently to recover for a total loss. The subsequent claim and litigation is, in truth, by and for the benefit of the underwriter. The assured is only bound to prove the neutrality in the suit between the underwriter and himself.

The doctrine that all the world are parties to a suit upon a question of prize is a *mere fiction*, and is never applied to any question but that of the title to the thing itself.

2d. How does the principle stand upon precedents of other nations?

Upon a question of general law, or the law of nations, we are not to look to the practice of one nation only. We are as much bound by the precedents of France, as we are by those of England since our revolution.

In *France*, we are told by Emerigon, the sentence of a foreign prize court is not conclusive upon collateral cases. It only protects the title to the property acquired under it.

In *England* a system has been raised; but like an inverted cone, it rests only on a single point. The case of *Hughes* v. *Cornelius*, reported in 2 *Shower*, 232. *T. Raym.* 473. and *Skin.* 59. is the only basis upon which the fabric is erected. The case only decides, what we admit, that a foreign sentence is conclusive as to the title in the thing itself. This is the only reported case, prior to the revolution; and thus the question remained until the case of *Bernardi* v. *Motteux*, *Doug.* 575. which was decided in the year 1781. The point of that decision was, that a sentence of condemnation by a foreign court of admiralty, was not conclusive evidence of a breach of the warranty of neutrality, if the sentence does not appear to have proceeded upon that ground. | *Park*, *p.* 365. has given the result of all the cases, and deduces this general doctrine: p. 189

1. 'That wherever the ground of the sentence is manifest, and it appears to have proceeded expressly upon the point in issue between the parties;' or

2. 'Wherever the sentence is *general*, and no special ground is stated, there it shall be conclusive and binding, and the court here will not take upon themselves, in a collateral way, to review the proceedings of a *forum*, having competent jurisdiction of the subject matter.'

3. 'But if the sentence be so ambiguous and doubtful that it is difficult to say on what ground the decision turned;' or,

4. 'If there be colour to suppose that the court abroad proceeded upon matter not relevant to the matter in issue, there evidence will be allowed in order to explain.' And,

5. 'If the sentence, upon the face of it, be manifestly against law and justice, or be contradictory, the insured shall not be deprived of his indemnity; because, to use the words of Mr. Justice *Buller*, any detention by, particular ordinances or decrees, which contravene, or do not form a part of the law of nations, is a risk within a policy of insurance.'

The counsel for the plaintiff commented at large upon the cases of *Salouci* v. *Johnson*, *Park*, 362. *Lothian* v. *Henderson*, 3 *Bos. and Pul.* 516. *Geyer* v. *Aguilar*, 7 *T. R.* 681. *Garrels* v. *Kensington*, 8 *T. R.* 230. *Calvert* v. *Bovill*, 7 *T. R.* 526. *Kindersly* v. *Chase*, in the Cockpit, decided by Sir W. Grant, *Park*, 363. 5*th ed. Mayne* v. *Walter*, *Park*, 363. *Pollard* v. *Bell*, 8 *T. R.* 134. *Bird* v. *Appleton*, 8 *T. R.* 563. *Price* v. *Bell*, 1 *East*, 663. *Bearing* v. *Christie*, 5 *East*, 398. *Baring* v. *Clagett*, 3 *Bos. and Pul.* 212.

and 8 *T. R.* 192. *Christie* v. *Secretan*, from all which they drew the conclusion that according to English precedents, which, however, they denied
p. 190 to be authorities in this court, except the | case of *Hughes* v. *Cornelius*, a foreign sentence of condemnation is not conclusive evidence of the want of neutral character, unless it proceeds upon a ground warranted by the law of nations, or by treaties between the countries of the captor and the captured.

3d. As to *domestic precedents*, they are not decisive. In New-York the law is finally settled against the conclusiveness. 1 *N. Y. Cases in Error*, 7. 2 *N. Y. Cases in Error*, 217. 3 *N. Y. T. R.* 223. 240. But in the supreme court of Pennsylvania the question is still *sub judice*, as it is in most of the other states.

II. The cause expressly assigned for condemnation is not a lawful cause, either under the law of nations, or the treaty between this country and Great Britain.

The capture itself was a total loss, and gave the right to abandon. At the time of abandonment there was no restitution.

The sentence is not a decree of *enemy property*, nor generally as *lawful prize*, but it is a condemnation on special grounds. 1. That she was cleared out for Cadiz, a port actually blockaded. 2. That the master *persisted in his intention* of entering that port, after warning from the blockading force not to do so, in direct breach and violation of the blockade.

It is not stated that the blockade was known at the time of her sailing, nor that any *attempt* was made to enter Cadiz after notice. The special verdict finds that the blockade did not exist at the time of her sailing; and that after being verbally notified of the blockade, the vessel was at no time at liberty, so that she could have attempted to enter the port. That although the register was indorsed, yet the master had no knowledge of it until after his arrival at Gibraltar.

The offence charged is, persisting in an intention to do what he had no power to do. This intention is inferred from the conversation between the master and the admiral, which is detailed in the special verdict, and
p. 191 which, on the part of the latter, was insidious, and calculated to | entrap. From the effect of such conversations it was the duty of the court to protect the master. 1 *Rob.* 7. *The Mercurius.* The answer of the master was honest, simple, and proper: 'that in case he got no new orders, he should steer by his old ones.' This was no more than his duty. Those new orders, if given by the admiral, would have been obeyed, and would have justified the master in his deviation.

But even an *intention* to violate a blockade, unless followed by some *act*, such as *sailing* with that intent, &c. is no cause of condemnation under the *law of nations*. *Maley* v. *Shattuck*, 3 *Cranch*, 488. *The Betsey*, 1 *Rob.* 280. *The Spes and Irene*, 5 *Rob.* 76. *The Shepherdess*,

5 *Rob.* 235. *Vattel, b.* 3. *s.* 117. *The Vrow Judith,* 1 *Rob.* 128. *The Columbia,* 1 *Rob.* 130. *The Vrow Johanna,* 2 *Rob.* 91. *The Neptunus,* 2 *Rob.* 92. 95, 96. *The Apollo,* 5 *Rob.* 256. *The Columbia,* 1 *N. Y. Cases in Error,* 7. 1 *Rob.* 130. 3 *N. Y. T. R.* 226.

If the *intention* be not a cause of condemnation under the law of nations, much less is it under the British treaty, article 18. (*Laws U. S. vol.* 2. *p.* 484.) the words of which are, ' And whereas it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless, *after notice,* she shall again *attempt* to enter ; but she shall be permitted to go to any other port or place she may think proper.'

If condemned without an *attempt,* the sentence of condemnation is not warranted by the treaty, and therefore does not falsify the warranty of neutrality. 8 *T. R.* 434. *Pollard* v. *Bell.* 8 *T. R.* 562. *Bird* v. *Appleton.* 1 *East,* 663. *Price* v. *Bell.* 5 *East,* 398. *Baring* v. *Christie.* 1 *N. Y. Cases in Error,* 7. 3 *N. Y. T. R.* 226.

Argument for the defendants in error.

This court can only decide what the law is, not what it ought to be. |

We contend for three points. p. 192

1. That the vessel was justly condemned for attempting to break the blockade.

2. That the sentence is conclusive evidence of the fact.

3. That the condemnation was the consequence of the improper act of the master, for which the underwriters are not liable.

1. The first point is not denied, if the fact be that there was an *attempt* to break the blockade.[1]

A verbal notice to the master was as good as if it had been in writing, because he could himself see that a blockade *de facto* existed.

An *attempt* is a conclusion from a variety of facts and circumstances. 1 *Bos. and Pul.* 185. A persisting in the intention after warning ; a public open avowal of that intention when he had the offer of his liberty to go to any port but Cadiz, amounted to an attempt to break the blockade. The British squadron could not have suffered him to go off with such declarations. He had no right to demand orders from the British admiral, nor had the latter a right to give them. He could not direct him to what port to go. The master was bound to act according to his best

[1] *Rawle,* offered to read the *depositions* and *evidence* contained in the proceedings of the vice-admiralty, which were referred to by the special verdict, and of which a copy was thereto annexed.

But *the Court* stopped him, saying that the proceedings in the vice-admiralty court were only matter of evidence to the jury, into which this court could not look.

discretion in such a case. The only orders which the British commander could give were not to go to Cadiz.

It was a continuance (after notice) of the original attempt to enter the port, which was made before notice. 1 *Rob.* 123. 5 *Rob.* 256.

2. The sentence is conclusive evidence against the plaintiff. |

p. 193 This point is not now to be decided on principles of policy or comity, but upon principles of law long established and settled. It has been the fashion to consider this as a modern principle, fabricated upon national motives of interest since the revolution.

But it rests on principles of a much earlier date. It is found in existence at early periods, when the commerce of England was in its infancy. It is the application only which is modern.

In the '*case of copyhold leases*,' 4 *Co.* 29. (*a*) it was decided, that the sentence of the ecclesiastical court dissolving the marriage was conclusive evidence that the first marriage was void, and that the issue of the second marriage was legitimate. So in *Kenn's* case, 7 *Co.* 42, 43. it was holden, '*that the sentence*' of the ecclesiastical judge 'should *conclude* as long as it remained in force.' So in *Buller's N. P.* 244. it is said, 'In an action upon a *policy of insurance*, with a warranty that the ship was *Swedish*, the sentence of a *French* admiralty court condemning the ship as *English* property, was holden conclusive evidence.' This case is taken from *The Theory of Evidence*, published in 1761, and consequently was before our revolution. It seems to be the first case noticed in the books, where the principle was applied to a case of insurance. The case of *Fernandes* v. *De Costa*, *Park*, 177, 178. was in the *4th year of George III.* long before our revolution. In that case the sentence of the French prize court was holden to be conclusive evidence in favour of the underwriter. The counsel cited also *Carth.* 225. *Jones* v. *Bow*, where the sentence of the spiritual court was holden to be conclusive. Also the *Dutchess of Kingston's case*, 11 *State Trials*, and the case of *Moses* v. *M'Pherlan*, 2 *Burr.* 1005. and *Walker* v. *Witter*, *Doug.* 1. *Galbraith* v. *Nevil*, *Doug.* 5. *in note*. *Lord Kaim's Principles of Equity*, 369 to 375.

Thus stood the cases before the revolution. The principle of law was fixed and general; and all the later decisions are but applications of the principle to particular cases. Once admit the case of *Hughes* v. *Cornelius*

p. 194 to be law, and the whole doctrine, to the extent | to which it has been carried in England, flows as a necessary consequence. As *between the parties* it is admitted to be conclusive, and as to *the title to the thing*, the question is at rest. The plaintiff in this case was *party* to the suit in the vice-admiralty at Gibraltar. *He* is bound by the sentence at all events, however it might be with regard to another person. As to him it has passed *ad rem judicatam*. If the property in the thing has passed, why not the title to its value? The title is as much gone from the under-

writer as it is from the assured. He is equally precluded from the chance of recovery and from the benefit of the abandonment. By the *sentence* the property is changed. It is not by an act of arbitrary power, or of superior force, or by an act of legislation, but by the judgment of a court of *competent*, *peculiar*, and *exclusive* jurisdiction. For among nations, the court of the captor is as much a court of peculiar and exclusive jurisdiction of the question of prize, as the ecclesiastical courts are in England of ecclesiastical causes.

It is the adjudication of a court to whose jurisdiction he has submitted, by putting in his claim, and before which he was bound to support the neutrality of the property, in order to give him a right to recover against the underwriters. *They* do not undertake to support the neutrality of the property. That is entirely *his* business, and if he fails to do so, and by that means the property is lost, the loss must fall upon him.

It is of less importance *which way* the question is decided, than that it should be *settled*. When the law is once ascertained, merchants and underwriters will make their contracts accordingly, and provide against the effect of foreign sentences, if they think proper.

The warranty of neutrality necessarily refers to the decision of foreign *prize* courts. Neutrality is a question incident to that of prize, which can be tried only in a foreign court, because it can only be tried in a court of the belligerent captor, and our own courts are the courts of a neutral nation. Courts of prize are courts of the law of nations, and their decisions upon questions arising under the law of nations, are to be | considered as p. 195
the judgments of domestic courts. The question of neutrality is always expected to be agitated in a foreign tribunal. The underwriters do not take upon themselves the risk of condemnation for want of the neutral character, and it is to protect them from that risk that the warranty of neutrality is inserted. But if the sentence is conclusive to prevent them from all chance of recovering the property, and not conclusive in their favour against the claim of the assured, the warranty of neutrality would afford them no protection from the risk against which it was the understanding of the parties that they should be protected.

The counsel then went into an examination of the cases of *Rapalje* v. *Emory*, 2 *Dall.* 51. 231. *Penhallow* v. *Doane*, 3 *Dall.* 85. 88. 116. *Vasse* v. *Ball*, 2 *Dall.* 270. *Vandenheuvel's case*, 2 *N. Y. Cases in Error*, 226. and *Maley* v. *Shattuck*, 3 *Cranch*, 488. to show that the general inclination of the courts in this country was in favour of the conclusiveness of a foreign sentence.

They also examined the cases of *Bernardi* v. *Motteaux*, *Doug.* 575. *Barzillai* v. *Lewis*, *Park*, 358. *Salouci* v. *Woodmas*, *Park*, 360. *Geyer* v. *Aguilar*, 7 *T. R.* 681. *Christie* v. *Secretan*, 8 *T. R.* 192. *Kindersley* v. *Chase*, *Park*, 363. (o). 5*th ed.* *Lothian* v. *Henderson*, 3 *Bos. & Pul.* 499.

Baring v. *Royal Ex. In. Co.* 5 *East*, 99. *Mayne* v. *Walter*, *Doug.* 363. *Pollard* v. *Bell*, 8 *T. R.* 434. *Bird* v. *Appleton*, 5 *T. R.* 562. *Price* v. *Bell*, 1 *East*, 663. and *Bolton* v. *Gladstone*, 5 *East*, 155. not only to show how far the doctrine has been extended in England, but to prove by the declarations of the judges that the principle, as applied to insurance cases, was adopted and undisputed before our separation from Great Britain.

3. The condemnation was the consequence of the improper act of the master, for which the underwriters are not answerable.

Underwriters are not liable for a loss proceeding from negligence or misconduct of the master, unless it amount to barratry. *Park*, 24.
p. 196 1 *Emerigon*, 364. 373. | 401. 441. 2 *Valin*, 79. 7 *T. R.* 160. 4 *Dall.* 294. and the case of *Gray* v. *Myers*, *MS.*

Argument, in reply.

1. The master of the vessel made no *attempt* to enter Cadiz after notice. He never had the power, because he never had the possession of his vessel after the warning. An attempt consists of an *act* as well as of an *intent*. But here there is evidence of an *intent only*. All the cases cited show some act done with the intent to enter.

2. As to the question of conclusiveness; all the cases cited from 4 and 7 *Co. Carthew*, and 2 *Burrows*, were *domestic* sentences. The case cited from *Bul. N. P.* and *The Theory of Evidence*, is of no authority. It does not appear when, nor where, nor by whom it was decided. The book is anonymous, and refers only to the case of *Hughes* v. *Cornelius*, 2 *Shower*, 232. which does not support it. The case of *Fernandes* v. *Da Costa* is not against us. There the sentence was supported by an answer in chancery of the plaintiff, and left to the jury by Lord Mansfield, with the other evidence; and the plaintiff was permitted to give evidence to show the ship was Portuguese, as warranted. The case of *Rapalje* v. *Emory* was a foreign attachment, and the only decision upon it was to give validity to the title of the property condemned. In the case of *Vasse* v. *Ball*, the court did not decide the sentence to be conclusive, but went into an examination of its merits.

The common law courts have exclusive jurisdiction of questions of insurance, and wherever the question of neutrality is necessarily involved in a question of insurance, they have as complete jurisdiction to try the question of neutrality, as a court of prize has. That court which has jurisdiction of the principal question, has necessarily jurisdiction of all incidental questions. The underwriter takes upon himself the risk of *unlawful* capture, and the court which is to decide upon his liability in the particular case, must necessarily decide whether the capture were lawful or not; and if found to be unlawful, the plaintiff must recover. |

3. No words of the master could amount to such conduct as would p. 197
exonerate the underwriters. He did no act whatever.

February 8, 1808.

MARSHALL, Ch. J (all the seven judges being present) delivered the opinion of the court as follows: viz.

This suit is instituted to recover from the underwriters the amount of a policy insuring the brig John, on a voyage from Charleston to Cadiz. The vessel was captured on her passage by a British squadron then blockading that port, was sent into Gibraltar for adjudication, and was there condemned by the court of vice-admiralty as lawful prize. The assured warrants the ship to be American property; and the defence is, that this warranty is conclusively falsified by the sentence of condemnation.

The points made for the consideration of the court are,

1st. Is the sentence of a foreign court of admiralty conclusive evidence, in an action against the underwriters, of the facts it professes to decide? If so,

2d. Does this sentence, upon its face, falsify the warranty contained in the policy? If not,

3d. Does the special verdict exhibit facts which falsify the warranty?

The question on the conclusiveness of a sentence of a foreign court of admiralty having been more than once elaborately argued, the court reluctantly avoids a decision of it at present. But there are particular reasons which restrain one of the judges from giving an opinion on that point, and another case has been mentioned, in which it is said to constitute the sole question. In that case, it will of course be determined. |

Passing over the consideration of the first point, therefore, the cour p. 198
proceeded to inquire whether this cause could be decided on the second and third points.

Admitting for the present that the sentence of a foreign court of admiralty is conclusive, with respect to what it professes to decide, does this sentence falsify the warranty contained in this policy, that the brig John is American property?

The sentence declares 'the said brig to have been cleared out for Cadiz, a port actually blockaded by the arms of our sovereign lord the king, and that the master of said brig persisted in his intention of entering that port, after warning from the blockading force not to do so, in a direct breach and violation of the blockade thereby notified.'

The sentence, then, does not deny the brig to have been American property. But it is contended by the counsel for the underwriters,

that a ship warranted to be American is impliedly warranted to conduct herself during the voyage as an American, and that an attempt to enter a blockaded port, knowing it to be blockaded, forfeits that character.

This position cannot be controverted.

It remains, then, to inquire, whether the sentence proves the brig John to have violated the laws of blockade; that is, whether the cause of condemnation is alleged in such terms as to show that the vessel had forfeited her neutral character, or in such terms as to show its insufficiency to support the sentence.

The fact of clearing out for a blockaded port, is in itself innocent, unless it be accompanied with knowledge of the blockade. The clearance, therefore, is not considered as the offence; the persisting in the intention to enter that port, after warning by the blockading force, is the ground of the sentence.

Is this intention (evidenced by no fact whatever) a breach of block-
p. 199 ade? This question is to be decided by | a reference to the law of nations, and to the treaty between the United States and Great Britain.

Vattel, b. 3. *s.* 177. says, 'All commerce is entirely prohibited with a besieged town. If I lay siege to a place, or only form the blockade, I have a right to hinder any one from entering, and to treat as an enemy whoever *attempts* to enter the place, or carry any thing to the besieged, without my leave.'

The right to treat the vessel as an enemy is declared, by Vattel, to be founded on the *attempt* to enter, and certainly this attempt must be made by a person knowing the fact.

But this subject has been precisely regulated by the treaty between the United States and Great Britain, which was in force when this condemnation took place. That treaty contains the following clause:

'And whereas it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded or invested; it is agreed that every vessel so circumstanced may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless after notice she shall *again attempt to enter;* but she shall be permitted to go to any other port or place she may think proper.'

This treaty is conceived to be a correct exposition of the law of nations; certainly it is admitted by the parties to it, as between themselves, to be a correct exposition of that law, or to constitute a rule in the place of it.

Neither the law of nations nor the treaty admits of the condemnation of the neutral vessel for the intention to enter a blockaded port, uncon-

nected with any fact. Sailing for a blockaded port, knowing it to be blockaded, has been in some English cases construed into an attempt to enter that port, and has therefore been adjudged a breach of the blockade from the departure of the vessel. | Without giving any opinion p. 200
on that point, it may be observed, that in such cases the fact of sailing is coupled with the *intention*, and the sentence of condemnation is founded on an actual breach of blockade. The cause assigned for condemnation would be a justifiable cause, and it would be for the foreign court alone to determine whether the testimony supported the allegation that the blockade was broken. Had this sentence averred that the brig John had broken the blockade, or had attempted to enter the port of Cadiz after warning from the blockading force, the cause of condemnation would have been justifiable, and without controverting the conclusiveness of the sentence, the assured could not have entered into any inquiry respecting the conduct of the vessel. But this is not the language of the sentence. An attempt to enter the port of Cadiz is not alleged, but persisting in the intention, after being warned not to enter it, is alleged as the cause of condemnation. This is not a good cause under the treaty. It is impossible to read that instrument without perceiving a clear intention in the parties to it, that after notice of the blockade, an attempt to enter the port must be made, in order to subject the vessel to confiscation. By the language of the treaty it would appear that a second attempt, after receiving notice, must be made, in order to constitute the offence which will justify a confiscation. 'It is agreed,' says that instrument, 'that every vessel so circumstanced' (that is, every vessel sailing for a blockaded port, without knowledge of the blockade) 'may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless after notice she shall again attempt to enter.'

These words strongly import a stipulation that there shall be a free agency on the part of the commander of the vessel, after receiving notice of the blockade, and that there shall be no detention nor condemnation, unless, in the exercise of that free agency, a second attempt to enter the invested place shall be made.

It cannot be necessary to state that testimony which would amount to evidence of such second attempt. Lingering about the place, as if watching for an opportunity | to sail into it, or the single circumstance p. 201
of not making immediately for some other port, or possibly obstinate and determined declarations of a resolution to break the blockade, might be evidence of an attempt, after warning, to enter the blockaded port. But whether these circumstances, or others, may or may not amount to evidence of the offence, the offence itself is attempting again to enter, and 'unless, after notice, she shall again attempt to enter,'

the two nations expressly stipulate ' that she shall not be detained, nor her cargo, if not contraband, be confiscated.' It would seem as if, aware of the excesses which might be justified, by converting intention into offence, the American negotiator had required the union of fact with intention, to constitute the breach of a blockade.

The cause of condemnation, then, as described in this sentence, is one which, by express compact between the United States and Great Britain, is an insufficient cause, unless the intention was manifested in such manner as, in fair construction, to be equivalent to an attempt to enter Cadiz, after knowledge of the blockade. This not being proved by the sentence itself, the parties are let in to other evidence.

However conclusive, then, the sentence may be, of the particular facts which it alleges, those facts not amounting, in themselves, to a justifiable cause of condemnation, the court must look into the special verdict, which explains what is uncertain in the sentence. The special verdict shows that the vessel was seized on her approaching the port of Cadiz, without previous knowledge of the blockade; that she never was turned away, and ' permitted to go to any other port or place; ' that she was ' detained ' for several days, and then sent in for adjudication, without being ever put into the possession of her captain and crew, so as to enable her either ' again to attempt to enter ' the port of Cadiz, or to sail for some other port; that while thus detained, the commander of the blockading squadron drew the captain of the John into a conversation which must be termed insidious, since its object was to trepan him into expressions which might be construed into evidence of an
p. 202 intention to sail for Cadiz should he be liberated; | that availing himself of some equivocal, unguarded, and perhaps indiscreet answers on the part of the captain, the vessel was sent in for adjudication; and on those expressions was condemned.

This court is of opinion that these facts do not amount to an attempt again to enter the port of Cadiz, and therefore do not amount, under the treaty between the United States and Great Britain, to a breach of the blockade of Cadiz. The sentence of the court of vice-admiralty in Gibraltar, therefore, is not considered as falsifying the warranty that the brig John was American property, or as disabling the assured from recovering against the underwriters in this action, and the testimony in the case shows that the blockade was not broken.

The judgment of the circuit court is to be reversed, with costs, and it is to be certified to that court, that judgment is to be entered on the special verdict for the plaintiff.

Judgment reversed.

Rose v. Himely.

(4 Cranch, 241) 1808.

If a claim be set up under the sentence of condemnation of a foreign court, *this* court will examine into the jurisdiction of such court; and if that court cannot, *consistently with the law of nations*, exercise the jurisdiction which it has assumed, its sentence is to be disregarded; but of their own jurisdiction, so far as it depends upon *municipal laws*, the courts of every country are the exclusive judges. Every sentence of condemnation by a competent court, having jurisdiction over the subject matter of its judgment, is conclusive as to the title to the thing claimed under it.

The prohibition, by France, of all trade with the revolted blacks of Santo Domingo, was an exercise of a *municipal, not* of a *belligerent* right; and seizures under that prohibition were only authorised within two leagues of the coasts of that island.

A seizure beyond the limits of the territorial jurisdiction, for breach of a municipal regulation, is not warranted by the law of nations; and such a seizure cannot give jurisdiction to the courts of the offended country; especially if the property seized, be never carried within its territorial jurisdiction.

Quere, whether a French court can, consistently with the law of nations, and the treaty, condemn American property never carried into the dominions of France, and while lying in a port of the United States.

THIS was an appeal from the sentence of the *circuit court* for the district of South Carolina, which reversed that of the *district judge*, who awarded restitution, to Rose the libellant, of certain goods, part of the cargo of the American *schooner Sarah*.

This vessel after trading with the brigands, or rebels of St. Domingo, at several of their ports, sailed from thence, with a cargo purchased there, for the United States; and had proceeded more than ten leagues from the coast of St. Domingo, when she was arrested by a *French* privateer, on the 23d of February, 1804, carried into the *Spanish* port of *Barracoa*, in the island of Cuba; and there, with her cargo sold by the captors, on the 18th of March, 1804, before condemnation, but under authority, as it was said, of a person who styled himself agent of the government of *St. Domingo*, at *St. Jago de Cuba*. The greater part of the cargo was purchased by ———— Cott, the master of an American vessel called the *Example*, into which vessel the goods were *clandestinely* transferred from the *Sarah*, in the night time, and brought into the port of Charleston, in South Carolina, where they were followed by Rose, the supercargo of the Sarah, who filed a libel against them, in behalf of the former owners, complaining of the unlawful seizure on the high seas, and praying for restoration of the goods: whereupon process was issued, and | the goods p. 242
were arrested by the marshal, on the *4th of May*, 1804. No steps appear to have been taken by the French captors, towards obtaining a condemnation of the vessel, until time enough had elapsed for them to receive information of the proceedings against the goods in this country. The forms of adjudication were begun in the tribunal of the first instance,

at *Santo Domingo*, in July, 1804, and the condemnation was had before the middle of that month.

This condemnation purports to be made conformably to the first article of the *arrete* of the captain general (*Ferrand*) of the *1st of March*, 1804, which was issued six days subsequent to the seizure of the vessel.

This article was as follows; 'The port of Santo Domingo is the only 'one of the colony of Santo Domingo, open to French and foreign com- 'merce; consequently every vessel anchored in the bays, coves and 'landing places of the coast occupied by the revolters, those destined for 'the ports in their possession, and coming out with or without cargoes; 'and generally every vessel sailing within the territorial extent of the 'island, (except between cape Raphael, and the bay of Ocoa,) found at 'a less distance than two leagues from the coast, shall be arrested by the 'vessels of the state, and by privateers bearing our letters of *marque*, 'who shall conduct them, as much as possible, into the port of Santo 'Domingo, that the confiscation of the said vessels and cargoes may be 'pronounced.'

On the 6th of September, 1806, no sentence of condemnation having been produced in evidence, the judge of the district court decreed restitution of the property to the libellant, from which sentence the other party appealed to the circuit court, and there produced the sentence of condemnation, by the *tribunal of the first instance*, at *Santo Domingo*. The circuit court reversed the sentence of the district court, and dismissed
p. 243 the libel.[1] | From this sentence, the libellant appealed to this court.

For the libellant, the case was argued by *C. Lee*, *Harper*, *S. Chase, jun.* *Dallas*, *Rawle*, *Ingersoll*, and *Drayton*, and

For the respondent, by *Duponceau*, *E. Tilghman*, and *Martin*.[2]

[1] The reasons of the circuit court are stated by Judge Johnson, in this sentence, see 4 *Cranch*, Appendix, note (C).

[2] This case was argued in connexion with the case of *Rose* v. *Groening*, which was a libel for another part of the cargo of the *Sarah*; and with the case of *La Font* v. *Bigelow*, from Maryland, which was an *action of replevin* by the original owner of goods condemned by the tribunal at Santo Domingo, under similar circumstances; and with the case of *Hudson and Smith* v. *Guestier*, also from Maryland, which was *trover* for the cargo of the *Sea Flower*, condemned upon similar grounds; and with the case of *Palmer and Higgins* v. *Dutilgh*, from Pennsylvania, which was *replevin* for the cargo of the *brig Ceres*, condemned under similar circumstances; and with the case of *Pluyment* v. *The Brig Ceres*, which was a *libel* in the district court of the United States at Philadelphia, for restoration of the vessel. These cases were all supposed to depend on the same questions, and by consent of counsel, with leave of the court, were argued as one cause. This accounts for the great number of the counsel employed, and for the great length of the argument, which consumed *nine days*.

Upon the opening of these cases, six judges being present, it appeared that three of the six judges had given opinions in the circuit court upon the principal points which were about to be argued, and that if each judge who had given an opinion, should withdraw from the bench, as had been customary heretofore, there would not remain a *quorum* to try the cause. It was thereupon agreed by all the judges that they would sit. *Chase, Johnson, and Livingston, Justices*, expressed themselves strongly against the practice of a judge's leaving the bench because he

For the libellant, it was contended,

1. That this was not a seizure *as prize of war*, but *as a forfeiture for violation of the municipal law of France*, and

2. That whether it were seized *jure belli*, or *jure civili*, it was not competent for the court, sitting at | *Santo Domingo*, to condemn the p. 244
property, while it was in a *neutral* foreign port.

1st. Point.

This is not a case of prize of war, but of municipal forfeiture.

The tribunal of the first instance was a municipal court; and it is doubtful whether it had cognizance of questions of *prize of war*. But if it had a general prize jurisdiction, it could not, consistently with our treaty with France, (*Laws U. S. vol. 6. p. 34. art. 22.*) condemn a prize not carried into a French port. The words of the article are, 'it is further 'agreed that, in all cases, the established courts for prize causes, *in the 'country to which the prizes may be conducted*, shall *alone* take cognizance 'of them.' Hence it is to be inferred, that as they could not consistently with the treaty, take cognizance of the case as *prize of war*, they themselves must have considered it as a mere seizure, for violation of a municipal regulation. It is characteristic of *prize of war*, that it is done with a view to annoy *an enemy*. When a neutral violates his neutrality, he becomes *quoad hoc*, an ally to the enemy, and the ground of condemnation is always as enemy property. But here was no feature of public war. It was merely an insurrection. All the world considered the blacks of St. Domingo as revolted subjects. Our government has acknowledged the right of France to legislate over those colonies. The French arrete is not a measure of *war*, but of *government;* and is a mere municipal regulation to enforce obedience to her laws, and for the reduction of the insurgents. The law of France rendered the trade illicit, but a seizure for illicit trade, is not the exercise of a right of war. It had no relation to a state of war; and might have been passed, if the most profound peace had existed throughout the world.

In the year 1802, France, Spain, and England were at peace with each other, and with all the world. The proceedings of France against her revolted colonies, were of a *civil* nature; at least they were so considered by her. (*See Bonaparte's letter to Toussaint, and Le* | *Clerk's letter* p. 245
of November, 1802, and his address to the people of St. Domingo.) Toussaint also considered himself as holding under the government of France, and to show his confidence, left his children in France as hostages.

The tribunals in *Santo Domingo*, were the ordinary tribunals of municipal jurisdiction, and not exclusively courts of prize. Their juris-

had decided the case in the court below. *Washington, Justice*, said he should not insist upon the practice, if it should be generally abandoned by the judges. The whole six judges (*Todd, Justice*, being absent) sat in the cause; so that the practice of *retiring* seems to be abandoned.

diction depended upon the *arretes* of the consuls of France, of the 18*th of*
p. 246 *June, and 2d of October*, 1802,[1] (a time of profound peace,) | and which refer to the year 1789, a time when France was also at peace with all the world. There was then no necessity of a prize court; and neither of those |
p. 247 arretes allude particularly to the insurrection of the blacks. That of 2d October, 1802, relates generally to the smuggling trade of the colonies; and refers to the *ancient laws*, not to the laws of war; but the *municipal* laws. From the jurisdiction of the court, then, it cannot be inferred that this was a case of prize of war; nor will such an inference be drawn from the colonial regulations respecting the trade.

[1] The following is the arrete of 18th of June, 1802.

'Arrete of the consuls concerning the mode of administration of civil and criminal justice in the colonies restored to France by the treaty of Amiens.

'The consuls, &c. on the report, &c. decree:

'1. In the colonies restored to France by the treaty of Amiens of 6th Germinal last, (27th March, 1802,) the tribunals which existed in 1789, shall continue to administer justice in civil as well as criminal matters, according to the forms of proceedings, laws, regulations, and tables of fees then observed, and so that nothing be innovated as to the organization, jurisdiction and competence of the said tribunals.

'2. The denominations of seneschalsea, admiralty and royal jurisdiction courts, shall be supplied by that of *tribunal of the first instance;* but from this change of denomination no change is to be inferred as to the jurisdiction of the ancient tribunals, and particularly of the courts of admiralty.

'3. The public ministry shall be exercised by commissaries of the government and their substitutes.

'4. There shall be provided a special regulation for the changes to be made in the present tribunals at *Tobago*.

'5. Judgments shall run in the name of the French Republic.

'6. The members of the tribunals shall be provisionally nominated according to the requisite forms, by the captain general. He shall receive from each of them a promise of fidelity to the French republic.'

The following is the arrete of 2d October, 1802.

'Arrete for regulating the forms to be observed for the proceedings and judgment of *contraventions* to the laws concerning foreign commerce in the colonies.

'The consuls, &c. on the report, &c. decree:

'1. The contraventions to the dispositions of the laws and regulations concerning foreign commerce in the colonies shall be proceeded on and adjudicated in the form herein after mentioned.

'2. The *instruction*' (*proceedings in preparatorio*) 'and *first judgment* shall belong to the *ordinary tribunal of the place where the prize shall have been conducted*, subject to an appeal in all cases to special commissioners, who shall pronounce in the last resort.

'The said *instruction* shall be made summarily and on simple memoirs.

'3. Within the extent of each captain-generalship, the commission shall be composed of the captain-general, the colonial prefect, the commissary of justice, of the grand judge; and in case of impediment of any of them, then of a substitute (*celui qui le remplace*) and besides, of three members of the court of appeal, chosen for each cause by the captain-general.

[Here follows a particular regulation as to *Tobago*.]

'4. In case of a division of opinions, that of the president shall preponderate.

'5. The inspector of the marine, or the officer of administration doing the duty of inspector, shall, of right, exercise the functions of the public ministry in the said commission of appeal.

'The functions of clerk shall be exercised by a secretary appointed for that purpose by the captain-general.

'6. As to the residue, the ancient laws shall be executed, so far as they are not altered by the present regulation.

'7. The minister of the marine and the colonies is charged with the execution of the present arrete, which shall be inserted in the bulletin of the laws.

(Signed) 'BONAPARTE.'

The first of these is the *arrete* of the captain-general, dated the 22d of June, 1802,[1] which is entirely municipal, and applies as well to French as to foreign vessels, and is limited in its operation, to within two leagues of the coast.

The next is that of the 9th of October, 1802, which is to the same effect.

The last is that of 1st March, 1804, which as to these cases was clearly *ex post facto*, but if applicable at all, shows itself to be merely an exercise of a municipal right. The sentence of condemnation itself, does not pretend to consider the vessel as prize of war, but as a seizure made for the violation of those municipal regulations of trade, which it recites. The order that the proceeds should be distributed according to the laws respecting prizes, would have been unnecessary, if it had been a case of prize, to which those laws would have applied independent of the order.

There would have been a gross inconsistency in France treating the revolters as rebels, and yet claiming that other nations should consider them as acknowledged enemies. Yet before France can claim the rights of war from neutrals, in regard to the insurgents of St. Domingo, she must | admit them to be *enemies*, and not *rebels*. If they are independent, p. 248
and France is at *war* with them, France can claim from us only the rights which war gives. We shall have a clear right to trade with them, unless in contraband of war, or to blockaded ports.

It either is, or is not, prize of war. There are only two sides to the question. *Prize* is a seizure *jure belli*. There must be a *war* to raise a question of prize. No open war then existed with any nation. It is said that by aiding rebels we make a common cause with them; but the assistance, to justify such an inference, must be the act of the nation, not the unauthorised act of individuals. Until the year 1806, the United States had never declared the trade to be unlawful; nor did France require our government to take notice of the trade, until the fall of 1805. The law of nations does not authorise the seizure and confiscation of the property of foreigners trading with rebels. No authority to that effect has been cited from any writer upon that law. A state has, by the law of nations, a right to regulate its own trade. A parent state may chuse to exercise a greater or less degree of severity, with regard to the trade of its colonies. England did not, until 1776, wholly prohibit trade with her North American colonies. The statute of 16 *Geo.* III. *c.* 5. prohibiting such trade, would have been altogether useless, if such

[1] The 13th article of that *arrete*, which is the only article referred to in the sentence of condemnation, is as follows:

'Every vessel, French or foreign, which shall be found by the vessels of the republic anchored in any of the ports of the island not designated by these presents, or within the bays, coves, or landings of the coast, or under sail at a distance less than two leagues from the shore, and communicating with the land, shall be arrested and confiscated.'

trade had been unlawful in consequence of the rebellion. It declares ' that all manner of trade and commerce is and shall be prohibited with the colonies of New-Hampshire,' &c. (naming the colonies,) ' and that all ships and vessels of or belonging to the *inhabitants* of the said colonies, together with their cargoes,' &c. ' and all other ships and vessels *whatsoever*, with their cargoes,' &c. ' which shall be found *trading* in any port or place, of the said colonies, or *going to trade*, or *coming from trading*, in any such port or place, shall become forfeited to his majesty, *as if* the same were the ships and effects of *open enemies*, and shall be so adjudged, deemed and taken, in all the courts of admiralty, and in all other courts whatsoever.'

The French arretes limit the right of seizure, to the extent of their
p. 249 territorial jurisdiction ; but if they had | claimed a right under the law of nations, they would have authorised seizures as well on the high seas, as within two leagues of the coast.

The title of the arrete of *general Ferrand*, of the *10th Ventose, year* 12, (*1st March*, 1804,) which is referred to in the sentence of condemnation is, ' an arrete relative to vessels taken *in contravention to the dispositions* of the laws and regulations concerning the *French and foreign* commerce, *with the colonies*,' and the reason of passing the arrete, is stated in the preamble to be, ' that some of the French agents in the allied and neighbouring islands, had mistaken the application of the laws and regulations concerning vessels taken *in contravention*, upon the coasts of Santo Domingo, occupied by the *rebels*, and had confounded *these* prizes with *those made upon the enemies of the state ;* wishing to put an end to the abuses which may result therefrom, and which are as derogatory to the *territorial sovereignty*, as they are to *neutral rights*,' &c. &c. thus clearly taking a distinction in terms, between these municipal seizures, and prizes of war. The 8th article also ' speaks of *acquitting the accused* of *the contravention*, and the sentence of the appellate court, speaking of its jurisdiction, describes it thus ' for pronouncing in the last resort upon appeals, from judgments rendered in the first instance, by the provisional commission of justice, sitting in the town of *Santo Domingo*, upon prizes made by the vessels of the state, and by French privateers upon *neutrals*, taken in contravention of the laws and regulations, concerning the *smuggling* trade of the colony,' (a l'occasion des prises faites par les batiments de l'etat et par les corsaires François, sur les neutres pris en contravention, aux lois et reglemens concernant *le commerce interope* de la colonie.)

If this trade was illegal by the law of nations, there was no necessity for these French laws upon the subject.

2d. Point.

Whether the seizure were made as prize of war, or for violating

a municipal law of trade, it was not competent | for the court sitting p. 250
at *Santo Domingo*, to condemn the property *while lying in a foreign neutral port*.

No title could vest in the purchaser by a sale, without a condemnation; although, perhaps, a subsequent legal condemnation might relate back to the time of the sale, and vest a legal title in the purchaser. But the condemnation of the property in this case could not be a legal condemnation, while the property was not only in *South Carolina*, but actually in the custody of *our* law. It had got back to the country of its original owner, who had claimed the protection of our laws.

The mere capture, even by a belligerent and *jure belli*, does not divest the title of the property out of the neutral owner; but an order or sentence of some competent tribunal is necessary for that purpose.

The title of the captor, before condemnation, does not extend beyond his actual possession; and if he loses or quits the possession, his title is entirely gone. Here had been a change of possession before condemnation. If a captured vessel escape before condemnation, the title revests in the former owner. 4 *Rob.* 50. *The Henrick and Maria. Collection of Sea Laws*, 629. 8 *T. R. Havilock* v. *Rockwood.* 1 *Rob.* 114. *The Flad Oyen.* 2 *Bur.* 693. *Goss* v. *Withers. Institute* 2. 1. 17.

Although new evidence may be admitted upon the appeal, yet the sentence of condemnation in this case, ought not to have been admitted, because it was not the sentence of a competent tribunal. The question of competence is always open, whatever may be the law, as to the conclusiveness of a foreign sentence. The court at *Santo Domingo* had no jurisdiction over this coffee.

Incompetence, may arise from want of jurisdiction, as to the subject of litigation, or as to the place where the tribunal sits. Neither by the law of nations, nor by treaty, could it condemn property while it was in the custody of our laws, and in contest in our courts. Even if the property had been in *France*, it is very doubtful whether the court of *Santo Domingo* could have condemned it. The proceeding was *in rem*, and from the nature of things, the *res*, the *thing* against which the | suit is p. 251
instituted, ought to be within the power and jurisdiction of the court before which it is tried; it ought at least to be in the same country. If it be a case of *mere municipal* jurisdiction, the court cannot proceed if the *thing* be in the country even of an *ally*; for an *ally* in a war, is not an *ally* as to the execution of the municipal laws of the *co-ally*. Suppose a seizure to be made by *Spain*, for an illicit trade in contravention of her municipal laws, and the vessel never carried into a *Spanish* port, but into a *French* port. The *Spanish* court could not proceed. One country will not enforce the municipal laws of another. In this country no court has jurisdiction *in rem*, unless the *thing* be within its

jurisdiction. So by our treaty with *France*, no court has jurisdiction of a cause of prize but the court of the place or country to which the prize was carried. But here the vessel was carried to a *Spanish* country, and condemned in a *French court.*

This Court has an undoubted right to examine into the competency of the court whose sentence is produced in evidence. That question was decided in the case of *Glass* v. *Gibbs*, (*The Betsey*,) 3 *Dall.* 7. and if not competent, this court will disregard its sentence.

Sir W. Scott, in a great number of cases, has looked into the question of the competency and jurisdiction of the court, and inquired whether the court proceeded according to the law of nations. 1 *Rob.* 142. *The Flad Oyen.* 8 *T. R.* 270. *Havilock* v. *Rockwood*, and 2 *Rob.* 172. *The Christopher.*

In the case of *Sheafe & Turner* v. *A parcel of sugars, in the circuit court of South Carolina, in* 1800, the sugars, it is said, were carried into a Spanish port and condemned in a French port; but Spain was then an ally of France, and the capture was *jure belli.*

When it is said that a neutral court has no cognizance of prize, it means that a neutral court cannot interfere between *belligerents*, but not that a neutral court shall not interfere between a belligerent and one of its own neutral citizens. 3 *Rob.* 82. *The Kierlighett.* 2 *Rob.* 239.
p. 252 *The Perseverance.* Of what use is a treaty, if a sentence | contrary to that treaty is to be respected by the nation whose rights are thereby violated? In *Mayne* v. *Walter, Park*, 414. *Pollard* v. *Bell*, 8 *T. R.* 437. and *Bird* v. *Appleton*, 8 *T. R.* 562. it is decided that a condemnation grounded upon an arbitrary arrete is void. *Browne* (*Civ. Law, vol.* 2. *p.* 332.) says, that where the proceeding is *in rem*, it must be where the *thing* is. The powers of *condemnation* and of *restoration* belong to the same court. It must have the possession of the thing in order to restore it.

The court is said to proceed *instanter, velo levato.* If the court of Santo Domingo had decreed restitution, it could not have enforced its decree. In the case of the *Henrick and Maria*, 4 *Rob.* 52. Sir William Scott, while he acknowledges that the English practice has been to condemn vessels lying in a *neutral* port, seems to express a wish that the superior court would *recall* the practice *to the proper purity of the principle.* In p. 46. he says, that 'upon principle it is not to be asserted that a ship, brought into a *neutral* port, is, with effect, proceeded against in the *belligerent* country. The *res ipsa*, the *corpus*, is not within the possession of the court; and *possession, in such cases, founds jurisdiction.*'

It was upon this *pure* principle that the 22d article of the French convention was founded. It is no argument to say that the courts of each nation must have an equal right to expound that convention, and that if we think their construction incorrect, we must apply to govern-

ment for redress. If application were to be made to government, we should be sent back again to our courts of law; and not until it should be there pronounced that the French construction was incorrect, would *our* government make application to that of France for redress. In case of rescue or escape, the government is never bound to restore. The capturing nation takes redress in its own way, and by its own strength, and cannot require the aid of our arm. The penal laws of a foreign country can affect only the property in its power, (1 *H. Bl.* 134, 135.) and cannot be executed by the courts of another. 2 *Wash.* 295. 298. Municipal law cannot make prize of war. 2 *Dall.* 4. 3 *Dall.* 77. | and if the thing be not within the jurisdiction of the court, it cannot p. 253
proceed. 3 *Dall.* 86. It must at least be in the country of the captor or of his ally. 2 *Browne's Civ. Law*, 268.

No property can be acquired by capture, unless it be carried *infra præsidia, i.e.* into the ports of the enemy of the captured; and according to *Lee*, the ports of an ally will not answer. *Lee on Captures*, 87. to 96. A capture cannot give a title, unless it be of enemy's property. 2 *Dall.* 2. 34. The case of *Wheelwright* v. *Depeyster*, 1 *Johnson*, 471. was in all its circumstances exactly like the present, and the supreme court of New-York decided the court at Santo Domingo to be incompetent to condemn a vessel lying at *St. Jago de Cuba.* Spain was not an ally in the war. She professed to be neutral, and was bound to neutral duties. (See her own declaration to her subjects, dated the 10th of September, 1804, and her manifesto and declaration of war of 10th of December, 1804, in the New Annual Register of that year.) Although there was a treaty of alliance between her and France, yet by the terms of that treaty Spain was not bound to assist France until called upon; and France had not then demanded her aid. She was therefore neutral, and was bound to refrain from giving any direct aid to either of the belligerents. But to allow one belligerent to carry prizes into her ports, and deposit them there for safe keeping, is a violation of neutrality—it is a direct aid. Spain did wrong to permit this kind of deposit, and therefore no right can be derived from it. It is not always necessary to make application to government for redress by negotiation or war. If the title derived from the captor be bad, and the thing is brought within the jurisdiction of our courts, it is competent for those courts to give redress, and restore the thing to its lawful owner. But when a neutral becomes an ally, she is no longer bound to perform these *neutral* duties, she becomes a partner in the war, and is bound to *belligerent* duties. She is bound to give her aid to her co-belligerent. The exception of the country of an ally, therefore, strengthens the general rule, that the property cannot be lawfully condemned while lying in a neutral country. |

p. 254 The possession of one ally is *quoad hoc* the possession of the other.

Proceedings for forfeitures are always proceedings *in rem;* and to make them valid, it is always necessary that the court should have possession of the *thing*. Possession is the foundation of all its proceedings. How can it condemn what is not in its power to give? Or how restore what is not within its controul? This principle applies as universally to captures *jure belli*, as to seizures for municipal offences. If this be a municipal seizure, it is immaterial whether Spain was an ally in the war or not; because she could not be an ally as to municipal offences. One ally never gives up offenders against the municipal laws of the other, unless bound so to do by treaty. One ally is not bound to aid the other in maintaining the authority of its own laws. So if property be carried to the country of one ally, the laws of the other cannot reach it. The former is not bound to give it up to the latter, nor to enforce its municipal judgments or decrees.

The arrete of 2d October, 1802, gives the jurisdiction only to 'the ordinary tribunal of the *place where the prize shall have been conducted;*' so that by the *lex loci* the court at Santo Domingo had no jurisdiction, even if the vessel had laid at another French port.

Captors gain no right by mere capture. Whatever is acquired *jure belli*, belongs to the sovereign. No title is gained until condemnation. 3 *Rob.* 193. France herself, when neutral, will not permit a belligerent to detain his prize in her ports more than 24 hours. 2 *Azuni*, 256. A man can sell only what he has. But the captor, before condemnation, had at most a right of possession. The right is said to be in abeyance, subject to the chance of recapture, and to the *jus postliminii*. If it be said that *jus postliminii* does not apply to neutrals, we say, that when a belligerent treats a neutral as an enemy, the latter becomes entitled to belligerent rights. If rescued, what becomes of the right acquired by capture? There is no instance of a condemnation after such a rescue,
p. 255 nor of a complaint to | the government of the neutral. The rule in all cases of sale of captured goods is, *caveat emptor*.

On the part of the respondent, (the purchaser under the sale at Barracoa,) it was admitted that there were only two questions in the case, viz.

1. Whether the vessel was seized *jure belli*, or in execution of municipal laws?

2. Whether the condemnation by a court in Santo Domingo, while the vessel was in a Spanish port, was a legal condemnation?

1. The condemnation was in exercise of belligerent rights, and not for violation of a municipal law.

England, during the contest with these states, always claimed and exercised the rights of war. France never complained, even before she became a party. So France is to be considered as a belligerent with respect

to *Hayti*. There were armies on both sides, arrayed against each other, fighting battles, taking towns, and carrying on a war in fact. It was not a trifling and partial insurrection, but a most cruel and bloody war. It was a *civil*, or rather a *servile* war, but not to be distinguished from other wars as to belligerent rights. The non-intercourse act passed by congress in 1798 or 1799, if it had stood alone, might have been considered as a municipal regulation ; but connected with other facts, it was taken by this court to be an act of the partial war then waging against France. So the act of the British parliament, in 1776, prohibiting all trade with the North American colonies, was an act of war. The word *war* was not used, because England, as a matter of punctilio, would not acknowledge us as an independent nation. This court said we were at war with France in 1798, but congress did not say so ; and France always denied it. So the Netherlands were at war with Spain for 70 years, but Spain would never acknowledge it.

If there was war between France and Hayti, the *arrete* seems clearly to be a war-measure, an exercise of | belligerent rights. Its only object p. 256
was the annoyance of the enemy. There are many acts which, if considered alone, might appear equivocal whether intended as measures of peace or of war, and can only be explained by concomitant circumstances. Municipal rights may be brought in aid of belligerent rights, and when hostilities are actually existing, an act which might be done in time of peace may be considered as a measure of war.[1] |

[1] In answer to a question from the court, Mr. *Duponceau* observed as follows, viz.

The question is, whether France can, by the mere force of the law of nations, seize and confiscate vessels of neutral nations trading to Hayti.

If it is admitted that the situation of France with Hayti is a war, it follows, that France is at war, and we are neutrals.

If neutrals, we cannot judge of any thing as *de jure* which is the subject of the controversy between France and Hayti.

Hayti contends that *de jure* she is an independent state.

France contends that *de jure* Hayti is her dependent colony.

Of this, as neutrals, we are not permitted to judge.* We find them at war together, and at issue on this question of *dependent* or *independent* ; we must take them both to be right.

We cannot, therefore, acknowledge the right of France to make and enforce *municipal* regulations for Hayti ; it would be acknowledging the sovereignty of France over Hayti, and thus deciding the question between them, which we are not permitted to do as neutrals.

Nor can we permit our subjects to trade with Hayti, contrary to the prohibition of France, for that would be acknowledging the independence of Hayti, and as such would be a violation of our neutrality, by deciding in favour of one side the very question in controversy between them.

But it will be said, that if we consider France merely as a power at war with Hayti, she has no right to prohibit our trading with them, as one nation at war cannot forbid neutrals to trade with its enemy, except in contraband articles.

This is true in the case of a war between independent states, but this war is of a different character, and produces different effects.

It is a principle of the law of nations, that in war both belligerents and neutrals

* 3 *Vat.* § 188. *Ibid.* § 190. 2 *Azuni*, 63, &c. *Hubner.*

p. 257 It is not necessary that a prize court should be a court of admiralty. Prizes are sometimes condemned in a tribunal of commerce. 2 *Azuni*, 262.

p. 258 3 *Bos. and Pul.* | 526. But this was a court of admiralty. It was founded upon the model of the council of prizes at Paris. It is no part of the ordinary judicature; it is a political institution, established by a special commission from the government, to decide, in an *executive* capacity, on the validity of maritime captures. 2 *Azuni*, 268. 2 *New Code des Prises*, 1070. *Arrete of 18th June*, 1802.

2. The condemnation of the vessel was valid, although lying in a neutral country.

The correctness of such condemnations is questioned on the single dictum of Sir W. Scott. When in the *Flad Oyen*, 1 *Rob.* 119, 120. he said that there were only two cases of ships carried into foreign ports and condemned in England, he was not candid; he knew there were more

have a right, with respect to each other, to do all that they had a right to do in time of peace, and immediately before the war, but no more.*

But in time of peace France prohibited other nations from trading with Hayti; that is, she prohibited them if she thought proper; in war she must continue to have the same right for the above reason, and because denying it to her would be judging the question in controversy between her and Hayti, which we have no right to do.

True, France claims it as a municipal right; it is the only object of her going to war; but she claims it of the Haytians, not of us, and if she did, we cannot concede it to her *as such*; we cannot grant her the right of binding the inhabitants of Hayti, or preventing *them* from trading with us; that we have nothing to do with; it is the question *between them* which we are not to decide; but we must grant to her the right of binding us, and preventing us from trading with Hayti, not as a municipal right, which right our neutrality prevents us from acknowledging, but as a belligerent right which she has to prevent us from interfering by our overt acts in the question of *dependence* or *independence* between her and the people of Hayti.

If she has the right to prevent us from interfering in that manner, she has incontestibly by the law of nations the right of punishing that interference by the seizure and condemnation of our ships and goods found in contravention.

France then claims two sorts of rights, municipal and belligerent; but the former claim is only between her and Hayti, and that we have nothing to do with; the latter is between her and all the world, and those we are bound to notice.

From her claim of those two concurrent rights, she, as Britain did in our revolutionary war, clothes her prohibitions in the shape of municipal regulations, thereby pretending to assert her claim of jurisdiction over her revolted subjects; that form she adopts for the sake of her national dignity; but we, who are not bound to support that dignity, recognize her rights only so far as they are sanctioned by the laws of a war of the nature of that in which she is engaged, and no further; and they do not bind us further than the laws of war, applied to the particular war existing, expressly authorise, but they bind us so far.

It may be said that as France claims the right of sovereignty over Hayti, she cannot complain of us if we should allow her that right, though we are not bound to do it as neutrals. It is answered, that she indeed claims that right, but she claims it of the subjects of Hayti, and not of us; those which she claims of us are those of a belligerent; she knows that she cannot claim any other of a neutral state, which has nothing to do with her quarrel; and she would have a right to complain of our adding insult to injury, if we were to allow her a right which she does not claim of us, by way of reason or pretext for denying her one which she actually, and we think justly, claims.

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* The prohibitions of England respecting the colonial trade of her enemies are founded on this principle, and carried to a degree of rigour which it does not seem to warrant.

than two such cases. And in 4 *Rob.* 52. *the Henrick and Maria*, he admits that the practice is *too inveterate* to be altered, and shows that the practice has been adopted or sanctioned by fourteen out of eighteen states in Europe. England adopted it as long ago as 1695. (4 *Rob.* 40.) In 1 *Wilson*, 191. as early as 1745, it was mentioned without exciting any astonishment; and in 4 *Rob.* 50. Sir *W. Scott* himself admits it was the practice in the wars of 1739, 1745, 1756, 1776, and 1793. France began it in 1705, and has continued it to this day. Sir W. Scott was mistaken in saying that the editor of the *New Code des Prises* speaks of it as an innovation. 1 *New Code des Prises*, 357. Russia adopted it in 1787, or perhaps earlier, and Spain during the last war, and probably before. It appears by 4 *Rob.* | 50. that it was tolerated by *Portugal, Tuscany,* p. 259
Naples, Sicily, the Pope, Genoa, Sardinia, Venice and *Denmark*. We do not find a contrary practice in the remaining states of Europe, *Holland, Sweden, Prussia* and *Austria*. We do not know what their practice is, but none of them have complained. It has therefore become the usage of nations; and congress, in the year 1781, by their resolve, declared the United States to be bound by the usage of nations. The practice is also approved by *Galliani*, in his treatise on the duties of nations and princes towards each other, *p.* 443. by *Azuni*, 2 *Az.* 326. and by *Lampredi*, on the commerce of neutrals in time of war, *p.* 192. The quotation from Lampredi, in *Wheelwright* v. *Depeyster*, 1 *Johnson*, 481. is incorrect; it makes him speak a language different from his sentiments. 2 *Az.* 254, 255.

The inconveniences of the contrary practice would be very great. If the captors are obliged to carry the prize a great way out of her course for adjudication, the risk of the seas is great, and the loss of the voyage inevitable. It will be a temptation to the captors to plunder the vessel and destroy her, and perhaps expose the prisoners to great dangers, by sending them adrift in the boat, or subjecting them to severe imprisonment.

The commissioners of England established at Lisbon and Leghorn had no power to adjudicate or condemn. They could only examine the prisoners on oath, and in certain cases restore the property captured.

In our partial war with France, we carried our prizes into neutral ports; and during the war with Tripoli, our cruizers were authorised by an act of congress to carry their prizes into neutral ports.

The treaty with France cannot be construed strictly. It must be expounded by the law and usage of nations.

There is no reason why the *res ipsa*, the *corpus*, should be within the territory. It is not that which gives jurisdiction. |

The principle which confines jurisdiction of prizes to the courts of the p. 260
captor, is the right which the sovereign has to inquire into the conduct

of his subjects, and to enforce the law of nations. 2 *Rutherford*, 566. Sir W. Scott holds the same doctrine *totidem verbis*. 3 *T. R.* 330. *Smart* v. *Wolff*.

It is but of late that a condemnation has been holden necessary to transfer the property.

3. But Spain was an ally in the war with St. Domingo, although she might not be an ally as to the war with England. The treaty between France and Spain, of August 19th, 1796, created an alliance offensive and defensive as to whatever concerned the mutual advantage of the
p. 261 two nations, and contained a guarantee of the islands.[1] | (*New Annual*

[1] EXTRACT FROM THE NEW ANNUAL REGISTER, 1796, PAGE 167. PUBLIC PAPERS.

Treaty of Alliance, offensive and defensive, between the French Republic and the King of Spain, August 19, 1796.

The Executive Directory of the French Republic, and his Catholic Majesty, the King of Spain, animated by the wish to strengthen the bonds of amity and good understanding happily re-established between France and Spain by the treaty of peace concluded at Basle, on the 4th Thermidor, in the third year of the Republic, (22d July, 1795,) have resolved to form an offensive and defensive treaty of alliance, for whatever *concerns the advantage and common defence* of the two nations; and they have charged with this important negotiation, and have given their full powers to the undermentioned persons, namely: The Executive Directory of the French Republic, to Citizen Dominique Catherine Perignon, General of Division of the Republic, and its Ambassador to his Catholic Majesty, the King of Spain; and his Catholic Majesty, the King of Spain, to his excellency, Don Manuel de Godoi, Prince of Peace, Duke of Alcudia, &c. &c. &c. who, after the respective communication and exchange of their full powers, have agreed on the following articles:

I. There shall exist for ever *an offensive and defensive alliance* between the French Republic and his Catholic Majesty, the King of Spain.

II. The two contracting powers shall be mutual *guarantees, without any reserve or exceptions*, in the *most authentic and absolute way*, of all the states, territories, islands, and other places which they possess, and shall respectively possess. And if one of the two powers shall be in the sequel, *under whatever pretext it may be, menaced or attacked*, the other promises, engages, and binds itself to *help it with its good offices*, and to *succour it on its requisition as shall be stipulated in the following articles*.

III. Within the space of three months, reckoning from the moment of the *requisition*, the power called on shall hold in readiness, and place in the disposal of the power calling, fifteen ships of the line, three of which shall be three deckers, or of 80 guns, and twelve from 70 to 74; six frigates of a proportionate force, and four sloops or light vessels, all equipped, armed and victualled for six months, and stored for a year. These naval forces shall be assembled by the power called on, in the particular port pointed out by the power calling.

IV. In case the requiring power may have judged it proper for the commencement of hostilities to confine to the one half the succour which was to have been given in execution of the preceding article, it may, at any epoch of the campaign, call for the other half of the aforesaid succour, which shall be furnished in the mode and within the space fixed, this space of time to be reckoned from the new requisition.

V. The power called on shall in the same way place at the disposal of the requiring power, within the space of three months, reckoning from the moment of the requisition, eighteen thousand infantry and six thousand cavalry, with a proportionate train of artillery, ready to be employed in Europe, and for the defence of the colonies which the contracting powers possess in the Gulf of Mexico.

VI. The requiring power shall be allowed to send one or several commissioners, for the purpose of assuring itself whether, conformably to the preceding articles, the power called on has put itself in a state to commence hostilities on the day fixed with the land and sea forces.

VII. These succours shall be entirely placed at the disposal of the requiring

Register for 1796, *p.* 167.) When one part of the nation separates from the other, and seeks to maintain its independence by force of arms,

power, which may have them in the ports and on the territory of the power called on, or employ them in expeditions it may think fit to undertake, *without being obliged to give an account of the motives by which it may have been determined.*

VIII. The demand of the succours stipulated in the preceding articles, made by one of the powers, shall suffice to prove the need it has of them, without its being necessary to enter into any discussion relative to the question, whether the war it proposes be offensive or defensive, *or without any explanation being required*, which may tend to elude the most speedy and exact accomplishment of what is stipulated.

IX. The troops and ships demanded shall continue at the disposal of the requiring power during the whole continuance of the war, without its incurring in any case any expense. The power called on shall maintain them in all places where its ally shall cause them to act, as if it employed them directly for itself. It is simply agreed on, that, during the whole of the time when the aforesaid troops or ships shall be on the territory or in the ports of the requiring power, it shall furnish from its magazines or arsenals whatever may be necessary to them, in the same way and at the same price as it supplies its own troops and ships.

X. The power called on shall immediately replace the ships it furnishes, which may be lost by accidents of war or of the sea. It shall also repair the losses the troops it supplies may suffer.

XI. If the aforesaid succours are found to be, or should become insufficient, the two contracting powers shall put on foot the greatest forces they possibly can, as well by sea as by land, against the enemy of the power attacked, which shall employ the aforesaid forces either by combining them or by causing them to act separately, and this conformably to a plan concerted between them.

XII. The succours stipulated by the preceding articles shall be furnished *in all the wars* the contracting powers may have to maintain, even in those in which the party called on may not be directly interested, and may act merely as a simple auxiliary.

XIII. In the case in which the motives of hostilities being prejudicial to both parties, they may declare war with one common assent against one or several powers, the limitations established in the preceding articles shall cease to take place, and the two contracting powers shall be bound to bring into action against the common enemy the whole of their land and sea forces, and to concert their plans so as to direct them towards the most convenient points, either separately or by uniting them. They equally bind themselves, in the cases pointed out in the present article, not to treat for peace unless with one common consent, and in such a way as that each shall obtain the satisfaction which is its due.

XIV. In the case in which one of the powers shall act merely as an auxiliary, the power which alone shall find itself attacked may treat of peace separately, but so as that no prejudice may result from thence to the auxiliary power, and that it may even turn as much as possible to its direct advantage. For this purpose advice shall be given to the auxiliary power of the mode and time agreed on for the opening and sequel of the negotiations.

XV. Without any delay there shall be concluded a treaty of commerce on the most equitable basis, and reciprocally advantageous to the two nations, which shall secure to each of them with its ally a marked preference for the productions of its soil or manufactures, or at least advantages equal to those which the most favoured nations enjoy in their respective states. The two powers engage to make instantly a common cause to repress and annihilate the maxims adopted by any country whatever, which may be subversive of their present principles, and which may bring into danger the safety of the neutral flag, and the respect which is due to it, as well as to raise and re-establish the colonial system of Spain on the footing on which it has subsisted, or ought to subsist, conformably to treaties.

XVI. The character and jurisdiction of the consuls shall be at the same time recognized and regulated by a particular convention. The conventions anterior to the present treaty shall be provisionally executed.

XVII. To avoid every dispute between the two powers, they shall be bound to employ themselves immediately, and without delay, in the explanation and developement of the 7th article of the treaty of Basle, concerning the frontiers, con-

p. 262 a war subsists *de facto*, and the *casus fœderis* has arisen. The | guarantee of the islands was against all men, traitors as well as enemies. The revolt of the negroes was a matter which concerned both nations. It was equally the interest of both that they should be suppressed. |

p. 263 The trading with the revolted slaves was in itself a violation of the law of nations. It is immaterial whether it be a violation of a municipal law, or of the rights of war. A vessel may be lawfully seized and con-

p. 264 demned | as prize for a violation of the law of nations, whether there be war or not. A French prize court does not come into existence nor cease with a war, but, like our district courts, always exists as a prize court.

The arretes of Le Clerc, Ferrand, &c. were mere proclamations; not laws, but declarations of what the law was before. The vessel was as liable to seizure after she had got out of the territorial jurisdiction, as if she had violated a blockade.

Whether it be a case of prize of war or of municipal cognizance, the court had a right to order a sale before condemnation, and a purchaser under such sale gained a good title against all the world. The sale was made under the order of the court by its authorised agent.

The communications of the French ministers *Pichon* and *Turreau* to our government, consider this trade as a violation of the law of nations, and our government has considered it in the same light. If it was only a violation of the municipal law of France, this country must have been prostrated *in dust and ashes*, when congress passed a law to carry into effect the municipal law of France. But the truth is, that if this government had not put a stop to the trade, it would have sanctioned a violation of the law of nations.

formable to the instructions, plans and memoirs which shall be communicated through the medium of the plenipotentiaries who negotiate the present treaty.

XVIII. England being the only power against which Spain has direct grievances, the present alliance shall not be executed unless against her during the present war, and Spain shall remain neuter with respect to the other powers armed against the republic.

XIX. The ratifications of the present treaty shall be exchanged within a month from the date of its being signed.

Done at St. Ildephonso, 2d Fructidor, (August 19,) the 4th year of the French Republic, one and indivisible.

(Signed) PERIGNON, and the PRINCE OF PEACE.

The Executive Directory resolves on and signs the present offensive and defensive treaty of alliance with his Catholic Majesty, the King of Spain, negotiated in the name of the French Republic by Citizen Dominique Catherine Perignon, General of Division, founded on powers to that effect by a resolution of the Executive Directory, dated 20th Messidor, (September 6,) and charged with its instructions.

Done at the National Palace of the Executive Directory, the 4th year of the French Republic, one and indivisible.

Conformable to the original,

(Signed) REVEILLIERE LEPAUX, President.

By the Executive Directory,

LAGARDE, Secretaire General.

In the Baltimore case, the court ought to have left the jury to decide, under all the circumstances of the case, whether the brigands had such a title to the property as to make a valid sale to the plaintiffs. The purchase was made only a few months after the slaves had driven out or murdered all the whites, and had confiscated their property. The probability is, that this very property was the property of the whites, obtained by plunder and robbery. If so, the robbers gained no title. It was, therefore, a matter of fact for the jury to decide.

But the principal question, whether a French court can condemn a prize lying in a neutral port, is to be determined, not by adjudged cases in one nation only, but by the law and practice of the civilized maritime | nations of Europe. It has been shown to be the practice of p. 265
most, if not of all the maritime nations of Europe for a century; and if *we* have no practice on the subject, and are now called upon to establish one, it will certainly be our interest to conform to that of Europe.

This is a civil war of the most odious kind—slaves against their masters. It is said, indeed, that they were free. But the same power which had declared them free, had since declared them to be *slaves*. But whether they are to be considered as free rebels, or as revolted slaves, *we* had no right to trade with them.

There are duties which one state owes to another in the case of rebellion. If a nation joins or assists the rebels, it becomes an enemy. Upon this point, authorities are not necessary. Reason alone is sufficient. The United States have never acknowledged the independence of Hayti; and the citizens of the United States have no right to consider it as an independent nation.

A law of a nation regulating the trade of foreigners in the territory of that nation, is not a municipal law, but a modification of the law of nations. By the law of nations, every state has a right to regulate the trade of foreigners with that state, and every such regulation is only a modification of that law.

To succour rebels is as much a violation of the law of nations, as to succour a blockaded port, or a besieged city.

A prize may be condemned while lying in a neutral port, or at the bottom of the sea, or even if the thing be consumed.

The condemnation does not give property; it only establishes the fact that the captor or his sovereign had a lawful title by the capture. 1 *Wilson*, 211. 2 *Azuni*, 262. 12 *Mod.* 134. *Rex* v. *Broom. Carthew*, 398. *S. C.* |

The owner of goods captured can only resort to the courts of the p. 266
captor for redress. *Doug.* 614. *Le Caux* v. *Eden.* No other nation can interfere. He has no right to apply to the courts of his own country, even if his goods are carried there. Neutrals cannot interfere; if they do, they make themselves parties in the war.

The treaty of alliance bound Spain to assist France against the revolted slaves. *Vattel* (*p.* 234. *b.* 2. *s.* 197.) says, 'An ally ought doubtless to be defended against *every invasion*, against every foreign violence, *and even against his rebellious subjects.*' A Spanish port was therefore to be considered as a port of an ally.

A neutral, whose property has been seized for violation of the law of nations, has no right to rescue it. He may escape with it if he can; but there is no *jus postliminii* in favour of neutrals.[1]

The court at Santo Domingo was the sole judge of its own jurisdiction. Its decision upon that point is conclusive upon this court.

The questions of *jus postliminii*, and *infra præsidia*, and of 24 hours
p. 267 possession, can only arise in a case | between the recaptor and the first owner, or between the latter and a vendee of the captor. As between the captor and the captured, the title passes by the seizure. A condemnation is only *evidence* of the lawfulness of the seizure. But it is not the only evidence. This doctrine is acknowledged by all the nations of Europe, except England. But England cannot make the law of nations. *Grotius*, *p.* 580, 581. *b.* 3. *c.* 6. *s.* 2. *and* 3. *tit.* 4. *Vattel*, *p.* 570. *b.* 3. *s.* 195, 196. 212. *p.* 585. *Burlemaqui*, (*last part*,) *p.* 222. *s.* 13. *and* 14. *Lee on Captures*, 68, 69, 70. 73. 76. 101, 102. *Jus postliminii* does not arise with regard to moveable goods, except ships; but a belligerent acquires the right to immoveable things, immediately upon capture. 1 *Emerigon*, 4*to ed.* (*French*,) *p.* 513. 2 *Azuni*, 236. 238. *Lee on Captures*, p. 64. *c.* 5. 1 *Rob.* 114. The reason of a distinction being taken between ships and other moveables, is, that the identity and title of a ship may be as certainly traced as that of land; and there is the same reason for the rule *caveat emptor*.

If the title to all foreign merchandize is to be thus questioned, it will be necessary to trace it up in all instances, to the original manufacturer, or to the cultivator of the soil. No purchaser will be safe. Such are not the principles of the common law.

A sale under a *fieri facias* is good, although the judgment be afterwards reversed. 3 *Bl. Com.* 448, 449. So in Maryland, although the

[1] MARSHALL, Ch. J. Do you contend that, after its escape, the captor may proceed to libel and condemn the property in the courts of the captor?

Martin. Unquestionably. The property vests by the capture.

JOHNSON, J. Is not a neutral vessel, captured as prize for a breach of the law of nations, *quoad hoc* an enemy, and as much entitled to rescue herself as an open enemy?

Martin. No. The offended nation would have a right to demand that she be given up by her government; and if it refuses, it sanctions the inimical act of its subject, and makes itself a party in the war. So if the seizure be for violation of a municipal law, the government of France has a vested right; but not if there be no seizure. If an American neutral vessel, not having a commission therefor, should assist in rescuing another neutral American vessel from a belligerent who had seized her as prize for violation of the law of nations, she would be guilty of piracy.

statute forbids an administrator to sell the slaves of his intestate, if there be sufficient other personal estate to pay the debts, yet if in violation of that law he sells the slaves, the title of the purchaser is good.

Even a municipal seizure vests the title in the government. 5 *Mod.* 193. *Roberts* v. *Withered.* *Comb.* 361. 12 *Mod.* 92. 5 *T. R.* 112. 117. *Wilkins* v. *Despard.*

But the purchaser, at all events, is entitled to salvage. While the property was in the hands of the captor, it was totally lost to the owner, who ought at all events to repay to the purchaser his purchase money, with interest, | and the expense of transportation to this country. p. 268

March 2.

MARSHALL, Ch. J. delivered the opinion of the court.

This is a claim for a cargo of coffee, &c. which, after being shipped from a port in *Santo Domingo*, in possession of the *brigands*, was captured by a French privateer, and carried into *Barracoa*, a small port in the island of *Cuba*, where it was sold by the captor. The cargo, having been brought by the purchaser into the state of South Carolina, was libelled in the court of admiralty, by the original American owner. The purchaser defends his title by a sentence of condemnation pronounced by a tribunal sitting in *Santo Domingo*, after the property had been libelled in the court of *this* country ; and by an order of sale made by a person styling himself delegate of the French government of Santo Domingo at *St. Jago de Cuba.*

The great question to be decided is,

Was this sentence pronounced by a court of competent jurisdiction?

At the threshold of this interesting inquiry, a difficulty presents itself, which is of no inconsiderable magnitude. It is this.

Can this court examine the jurisdiction of a foreign tribunal?

The court pronouncing the sentence, of necessity decided in favour of its jurisdiction ; and if the decision was erroneous, that error, it is said, ought to be corrected by the superior tribunals of its own country, not by those of a foreign country.

This proposition certainly cannot be admitted in its full extent. A sentence professing on its face to be the sentence of a judicial tribunal, if rendered by a self | constituted body, or by a body not empowered by p. 269 its government to take cognizance of the subject it had decided, could have no legal effect whatever.

The power of the court then is, of necessity, examinable to a certain extent by that tribunal which is compelled to decide whether its sentence has changed the right of property. The power, under which it acts, must be looked into ; and its authority to decide questions, which it professes to decide, must be considered.

But although the general power by which a court takes jurisdiction

of causes must be inspected, in order to determine whether it may rightfully do what it professes to do, it is still a question of serious difficulty, whether the situation of the particular thing on which the sentence has passed, may be inquired into, for the purpose of deciding whether that thing was in a state which subjected it to the jurisdiction of the court passing the sentence. For example; in every case of a foreign sentence condemning a vessel as prize of war, the authority of the tribunal to act as a prize court must be examinable. Is the question, whether the vessel condemned was in a situation to subject her to the jurisdiction of that court, also examinable? This question, in the opinion of the court, must be answered in the affirmative.

Upon principle, it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or in other words, on its jurisdiction over the subject-matter which it has determined. In some cases, that jurisdiction unquestionably depends as well on the state of the thing, as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within, or without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence. |

p. 270 Passing from principle to authority, we find, that in the courts of England, whose decisions are particularly mentioned, because we are best acquainted with them, and because, as is believed, they give to foreign sentences as full effect as are given to them in any part of the civilized world, the position that the sentence of a foreign court is conclusive with respect to what it professes to decide, is uniformly qualified with the limitation that it has, in the given case, jurisdiction of the subject-matter.

This general *dictum* is explained by particular cases.

The case of the *Flad Oyen*, 1 *Rob.* 114. was a vessel condemned by a belligerent court sitting in a neutral territory; consequently, the objection to that sentence turned entirely on the defect in the constitution of the court.

The Christopher, 2 *Rob.* 173. was condemned while lying in the port of an ally. The jurisdiction of the court passing the sentence was affirmed, but no doubt seems to have been entertained, at the bar, or by the judge himself, of his right to decide the question, whether a court of admiralty sitting in the country of the captor could take jurisdiction of a prize lying in the port of an ally. The decision of the tribunal at *Bayonne* in favour

of its own jurisdiction, was not considered as conclusive on the court of admiralty in England, but that question was treated as being perfectly open, and as depending on the law of nations.

The case of *The Kierlighett*, 3 *Rob.* 82. is of the same description with that of *The Christopher*, and establishes the same principle.

In the case of *The Henrick and Maria*, 4 *Rob.* 35. *Sir W. Scott* determined that a condemnation, by the court of the captor, of a vessel lying in a *neutral* port, was conformable to the practice of nations, and therefore valid; but in that case the right to inquire whether the situation of the thing, the *locus in quo*, did not take it out of the jurisdiction of the court, was considered as unquestionable. |

The case of *The Comet*, 5 *Rob.* 255. stands on the same principles. p. 271

The Helena, 4 *Rob.* 3. was a British vessel captured by an Algerine corsair owned by the Dey, and transferred to a Spanish purchaser by a public act in solemn manner before the Spanish consul. The transfer was guarantied by the Dey himself. The vessel was again transferred to a British purchaser under the public sanction of the judge of the vice-admiralty court of Minorca, after that place had surrendered to the British arms. On a claim in the court of admiralty by the original British owner, Sir W. Scott affirmed the title of the purchaser, but expressed no doubt of the right of the court to investigate the subject.

The manner in which this subject is understood in the courts of England, may then be considered as established on uncontrovertible authority. Although no case has been found in which the validity of a foreign sentence has been denied, because the thing was not within the ports of the captor, yet it is apparent that the courts of that country hold themselves warranted in examining the jurisdiction of a foreign court, by which a sentence of condemnation has passed, not only in relation to the constitutional powers of the court, but also in relation to the situation of the thing on which those powers are exercised; at least so far as the right of the foreign court to take jurisdiction of the thing is regulated by the law of nations and by treaties. There is no reason to suppose that the tribunals of any other country whatever deny themselves the same power. It is, therefore, at present, considered as the uniform practice of civilized nations, and is adopted by this court as the true principle which ought to govern in this case.

In pursuing the inquiry, then, whether the tribunal erected in *St. Domingo* was acting on a case of which it had jurisdiction when *The Sarah* was condemned, this court will examine the constitutional powers of that tribunal, the character in which it acted, and the situation of the subject *on* which it acted. |

Admitting that the ordinary tribunal erected in *St. Domingo* was p. 272
capable of acting as a prize court, and also of taking cognizance of offences

against regulations purely municipal, it is material to inquire in which character it pronounced the sentence of condemnation in the case now under consideration.

In making this inquiry, the relative situation of *St. Domingo* and France must necessarily be considered.

The colony of *St. Domingo* originally belonging to France, had broken the bond which connected her with the parent state, had declared herself *independent*, and was endeavouring to support that independence by arms. France still asserted her claim of sovereignty, and had employed a military force in support of that claim. A war *de facto* then unquestionably existed between France and *St. Domingo*. It has been argued that the colony, having declared itself a sovereign state, and having thus far maintained its sovereignty by arms, must be considered and treated by other nations as sovereign in fact, and as being entitled to maintain the same intercourse with the world that is maintained by other belligerent nations. In support of this argument, the doctrines of *Vattel* have been particularly referred to. But the language of that writer is obviously addressed to sovereigns, not to *courts*. It is for governments to decide whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of France over that colony as still subsisting.

It is not intended to say that belligerent rights may not be superadded to those of sovereignty. But admitting a sovereign who is endeavouring to reduce his revolted subjects to obedience, to possess both sovereign and belligerent rights, and to be capable of acting in either character, the manner in which he acts must determine the character of the act. If as a legislator he publishes a law ordaining punishments for certain offences, which law is to be applied by courts, the nature of
p. 273 the law, and of the proceedings under it, will | decide whether it is an exercise of belligerent rights, or exclusively of his sovereign power; and whether the court, in applying this law to particular cases, acts as a prize court, or as a court enforcing municipal regulations.

Let the acts of the French government which relate to this subject be inspected.

The notification given by Mr. *Pichon*, the French *charge d'affaires* to the American government, which was published in March, 1802, interdicts all manner of intercourse with the ports of *St. Domingo*, in possession of the revolted negroes, and declares that 'cruisers will arrest all foreign vessels *attempting* to enter any other port, and to communicate with any of the revolted negroes, to carry either ammunition or provisions to them. Such vessels,' he adds, 'shall be confiscated, and

the commanders severely punished, as violating the rights of the French Republic, and the law of nations.'

It might be questioned, under this notice, whether vessels sailing on the high seas, having traded with one of the brigand ports, would be considered as liable to seizure and to confiscation, after passing the territorial jurisdiction of the government of *St. Domingo*. A free trade with that colony had been allowed, and the revocation of that license is made known to the government of the United States. To its revocation the ordinary rights of sovereignty alone were sufficient. The notification, however, refers to the order of the commander in chief of the French Republic in *St. Domingo;* and that order would of course be examined as exhibiting more perfectly the extent and the nature of the rights which the French Republic purposed to exercise.

The particular order which preceded this notification is in these words: 'Every vessel, French or foreign, which shall be found by the vessels of the Republic riding at anchor in the ports of the island not designated by these presents, or within the bays, creeks, and landing places on the coast, or under sail at a less distance | than two leagues p. 274
from the coast, and communicating with the land, shall be forfeited.'

The next decree is dated the 22d of June, 1802, and the extract which is supposed to regulate this particular subject, is in these words: 'Every vessel, French or foreign, which shall be found by the vessels of the Republic anchored in one of the ports of the island, not designated by the present decree, or in the bays, coves, or landings of the coast, or under sail at a less distance than two leagues from the coast, and communicating with the land, shall be arrested and confiscated.'

Nothing can be more obvious than that these are strictly territorial regulations, proceeding from the sovereign power of St. Domingo, and intended to enforce sovereign rights. Seizure for a breach of this law is to be made only within those limits over which the sovereign claimed a right to legislate, in virtue of that exclusive dominion which every nation possesses within its own territory, and within such a distance from the land as may be considered as a part of its territory. This power is the same in peace and in war, and is exercised according to the discretion of the sovereign. The prohibition and the penalty are the same on French and foreign vessels.

This subject was again taken up in October, 1802, in an *arrete*, which in part regulates the coasting trade of the island. The 4th, 5th and 6th articles of this decree respect foreign as well as French vessels, and subject them to confiscation in the cases which are there enumerated.

These are all of the same description with those stated in the *arrete* of the 22d of June; and no seizure is authorised but of vessels found within two leagues of the coast.

The last decree is that which was issued by *General Ferrand* on the 1st of March, 1804. This deserves the more attention, because it is that on which the courts profess to found their sentence of condemnation, in the particular case under consideration, and because *General* |
p. 275 *Ferrand* uses expressions which clearly indicate the point of view in which all these *arretes* were contemplated by the government of the island.

The title of this *arrete* is, 'An *arrete* relative to vessels taken in contravention of the dispositions of the laws and regulations concerning French and foreign commerce in the colony.'

In stating the motives for this ordinance, it is said, 'That some French agents in the neighbouring and allied islands had mistaken the application of the laws and regulations concerning vessels taken in contravention, upon the coasts of St. Domingo occupied by the rebels, and had confounded those prizes with those which were made upon the enemy of the state.' 'Desiring to put an end to all the abuses which might result from this mistake, and which would be as injurious to the territorial sovereignty as to the rights of neutrality,' the commander in chief, after some further recitals, which are not deemed material, ordains the law under which the tribunals have proceeded.

The distinction, between seizures made in right of war, and those which are made for infractions of the commercial regulations established by the sovereign power of the state, is here taken *in terms;* and that legislation, which was directed against vessels contravening the laws and regulations concerning French and foreign commerce in the colony, is clearly of the latter description.

The first article of this *ordonnance* is recited in the sentence, as that on which the condemnation is founded. It is in these words:

'The port of Santo Domingo is the only one in the colony of St. Domingo that is open to the French and foreign commerce; in consequence, all vessels anchored in the bays, harbours, and landing places, on the coast occupied by the rebels, those cleared for the ports in their possession coming out with or without a cargo, and, generally, all vessels sailing in the territorial extent of the island, (except that from Cape
p. 276 Raphael to | Ocoa bay,) found at a distance less than two leagues from the coast, shall be detained by the state vessels and privateers having our letters of marque, who shall conduct them, if possible, into the port of *Santo Domingo*, that the confiscation of the said vessels and cargoes may be pronounced.'

As this article authorises a seizure of those vessels only which are 'sailing within the territorial extent of the island, found within less than two leagues of the coast,' it is deemed by the court to be sufficiently evident that the seizure and confiscation are made in consequence of a violation of municipal regulation, and not in right of war. It is true

that the revolt of the colony is the motive for this exercise of sovereign power. Still it is an exercise of sovereign power, restricting itself within those limits which are the province of municipal law, not the exercise of a belligerent right.

The tribunal professing to carry this law into execution, though capable of sitting either as a prize or an instance court, must be considered in this case as acting in the character of an instance court, since it is in that character that it punishes violations of municipal law.

The Sarah was captured more than *ten* leagues from the coast of St. Domingo, was never carried within the jurisdiction of the tribunal of that colony, was sold at Barracoa, in the island of Cuba, and afterwards condemned as prize under the *arrete* of *General Ferrand*, which has been stated.

If the court of St. Domingo had jurisdiction of the case, its sentence is conclusive. If it had no jurisdiction, the proceedings are *coram non judice*, and must be disregarded.

Of its own jurisdiction, so far as depends on municipal rules, the court of a foreign nation must judge, and its decision must be respected. But if it exercises a jurisdiction which, according to the law of nations, its sovereign could not confer, however available its sentences may be within the dominions of the prince from whom the authority is derived, they are not regarded | by foreign courts. This distinction is taken upon p. 277
this principle, that the law of nations is the law of all tribunals in the society of nations, and is supposed to be equally understood by all.

Thus the sentence of a court sitting in a neutral territory, and instituted by a belligerent, has been declared not to change the property it professed to condemn ; and thus the question whether a prize court sitting in the country of the captor could condemn property lying in a neutral port, has been fully examined, and although the jurisdiction of the court in such case was admitted, yet no doubt appears to have been entertained of the propriety of examining the question, and deciding it according to the practice of nations.

Since courts, who are required to decide whether the condemnation of a vessel and cargo by a foreign tribunal has effected a change of property, may inquire whether the sentence was pronounced by a court which, according to the principles of national law, could have jurisdiction over the subject ; this court must inquire whether, in conformity with that law, the tribunal sitting at St. Domingo to punish violations of the municipal laws enacted by its sovereign, could take jurisdiction of a vessel seized on the high seas, for infracting those laws, and carried into a foreign port.

In prosecuting this inquiry, the first question which presents itself to the mind is, what act gives an inchoate jurisdiction to a court ?

It cannot be the offence itself. It is repugnant to every idea of a proceeding *in rem*, to act against a thing which is not in the power of the sovereign under whose authority the court proceeds; and no nation will admit that its property should be absolutely changed, while remaining in its own possession, by a sentence which is entirely *ex parte*. Those on board a vessel are supposed to represent all who are interested in it, and if placed in a situation which requires them to take notice of any proceedings against a vessel and cargo, and enables them to assert the rights of the interested, the cause is considered as being properly
p. 278 heard, and all concerned | are parties to it. But the owners of vessels navigating the high seas or lying in port, cannot take notice of any proceedings which may be instituted against those vessels in foreign countries; and consequently, such proceedings would be entirely *ex parte*, and a sentence founded on them never would be, and never ought to be, regarded.

The offence then alleged to have been committed by *The Sarah*, could not be cognizable by the court of St. Domingo, until some other act was performed which should make the owners of the vessel and cargo parties to the proceedings instituted against them, and should place them within the legitimate power of the sovereign, for the infraction of whose laws they were to be confiscated. There must then be a seizure, in order to vest the possession of the thing in the offended sovereign, and enable his courts to proceed against it. This seizure, if made either by a civil officer, or a cruiser acting under the authority of the sovereign, vests the possession in him, and enables him to inquire, by his tribunals constituted for the purpose, into the allegations made against, and in favour of the offending vessel. Those interested in the property which has been seized are considered as parties to this inquiry, and all nations admit that the sentence, whether correct or otherwise, is conclusive.

Will a seizure *de facto*, made without the territorial dominion of the sovereign under cover of whose authority it is made, give a court jurisdiction of a thing never brought within the dominions of that sovereign?

This is a question upon which considerable difficulty has been felt, and on which some contrariety of opinion exists. It has been doubted whether proceedings, denominated judicial, are, in such a case, merely irregular, or are to be considered as absolutely void, being *coram non judice*. If merely irregular, the courts of the country pronouncing the sentence were the exclusive judges of that irregularity, and their decision binds the world; if *coram non judice*, the sentence is as if not pronounced.
p. 279 | It is conceded that the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens. It is not easy to conceive a power to execute a municipal law, or to enforce obedience to that law without the circle in which that law

operates. A power to seize for the infraction of a law is derived from the sovereign, and must be exercised, it would seem, within those limits which circumscribe the sovereign power. The rights of war may be exercised on the high seas, because war is carried on upon the high seas; but the pacific rights of sovereignty must be exercised within the territory of the sovereign.

If these propositions be true, a seizure of a person not a subject, or of a vessel not belonging to a subject, made on the high seas, for the breach of a municipal regulation, is an act which the sovereign cannot authorise. The person who makes this seizure, then, makes it on a pretext which, if true, will not justify the act, and is a marine trespasser. To a majority of the court it seems to follow, that such a seizure is totally invalid; that the possession, acquired by this unlawful act, is his own possession, not that of the sovereign; and that such possession confers no jurisdiction on the court of the country to which the captor belongs.

This having been the fact in the case of The Sarah, and neither the vessel, nor the captain, supercargo, nor crew, having ever been brought within the jurisdiction of the court, or within the dominion of the sovereign whose laws were infracted, the jurisdiction of the court over the subject of its sentence never attached, the proceedings were entirely *ex parte*, and the sentence is not to be regarded.

The case of The Helena, already cited, may at first view be thought a case which would give validity to any seizure wherever made, and would refer the legality of that seizure solely to the sovereign of the captor. But on a deliberate consideration of that case, the majority of the court is of opinion that this inference is not warranted by it. Several circumstances concurred in | producing the decision which was made, and p. 280
those circumstances vary that case materially from this. The captured vessel was carried into port, and while in the power of the sovereign was transferred by his particular authority in solemn form.

In such a case, Sir W. Scott conceived that a sentence of confiscation conformably with the laws of Algiers, was to be presumed. But his decision did not turn singly on this point. The vessel, after passing in this formal manner to a Spanish purchaser, had, with equal solemnity, been again transferred to a British purchaser; and the judge considered this second purchaser, with how much reason may perhaps be doubted, as in a better situation than the original purchaser. This case is badly reported, the points made by counsel on one side are totally omitted, and the opinion of the judge is not given with that clearness which usually characterizes the opinions of Sir William Scott. But the seizure was presumed to be made by way of reprisals for some breach of the treaty between the two powers, so that the possession of the captor was con-

sidered as legitimately the possession of his sovereign, and from the subsequent conduct of the Dey himself, a condemnation according to the usages of Algiers was presumed.

But in presuming a condemnation, this case does not, it is thought, dispense with the necessity of one; nor is it supposed, in presuming a legitimate cause of seizure, to declare that a seizure made without authority, by a commissioned cruiser, would vest the possession in the sovereign of the captor, and give jurisdiction to his courts.

If this case is to be considered as if no sentence of condemnation was ever pronounced, the property is not changed, and this court, having no right to enforce the penal laws of a foreign country, cannot inquire into any infraction of those laws. The property in this particular case was purchased under circumstances which exclude any doubt respecting its identity, and respecting the full knowledge of the purchaser of the nature of the title he acquired. |

p. 281 The sentence of condemnation being considered as null and invalid, the property is unchanged, and therefore ought to be recovered by the libellants in the court below. But those libellants ought to account with the defendants for the freight, insurance, and duties on importation, and for such other expenses as would have been properly chargeable on themselves as importers; and each party is to bear his own costs.

The sentence of the circuit court is to be reversed, and also the sentence of the district court, so far as it contravenes this opinion, and the cause is to be remanded to the circuit court for the district of South Carolina, for a final decision thereon.

Livingston, J. Without expressing an opinion on the invalidity of a seizure on the high seas under a municipal regulation, if the property be immediately carried into a port of the country to which the capturing vessel belongs, and there regularly proceeded against, I concur in the judgment just delivered, because The Sarah and her cargo were condemned by a French tribunal sitting at St. Domingo, without having been carried into that, or any other French port, and while lying in the port of Charleston, South Carolina, whither they had been carried, by and with the consent of the captor.

Cushing and Chase, Justices, concurred in opinion with Judge *Livingston.*

Johnson, J. This cause comes up on appeal from the circuit court of South Carolina, acting in the capacity of an instance court of admiralty. The doctrines which regulated the decision of the circuit court, are not overruled by a majority of the bench; but the decree of that court is rescinded, because to three of the five judges who concur in sustaining the appeal, it appears that the property could not be condemned in the court of St. Domingo, while lying in a neutral port; and to the other

two, that the capture on the high seas, for a breach of municipal regulation, was contrary to the law of nations, and therefore vested no jurisdiction in the court of St. Domingo. On the former doctrine it is not | necessary to make any observations, because in the case of the *Sea-flower*, p. 282
argued together with this as one cause, and decided on the same day, that doctrine is expressly overruled. But on the latter point I think it proper, briefly to state the reasons upon which I found my disapprobation, both of the doctrine and of its application to this case.

It would have been some relief to us in determining this question, had it been made a point by counsel, either in their argument in this court, or in the court below; but it appears to have been wholly unnoticed by them.

Most of the difficulties which have occurred in the investigation of this case, appear to have resulted from an indistinct view of the nature, origin, and object of prize courts. Conducted by the same forms, and very generally blended in the same persons, it is not easy to trace upon the mind, the discriminating line between the *instance* and *prize* courts; yet the object of the institution of the latter court, when considered, strongly marks the distinguishing point between them. In its ordinary jurisdiction, the admiralty takes cognizance of mere questions of *meum* and *tuum* arising between individuals; its extraordinary or prize jurisdiction is vested in it for the purpose of revising the acts of the sovereign himself performed through the agency of his officers or subjects. A seizure on the high seas by an unauthorised individual, is a mere traspass, and produces no change of right, but such a seizure made by sovereign authority, vests the thing seized in the sovereign; for the fact of possession must have all the beneficial effects of the right of possession, as the justice or propriety of it cannot be inquired into by the courts of other nations. But as this principle might leave the unoffending individual a prey to the rapacity of cruisers, or a victim to the errors of those who even mean well, and as every civilized nation pretends to the character of justice and moderation, and to have an interest in preserving the peace of the world, they constitute courts with powers to inquire into the correctness of captures made under colour of their own authority, and to give redress to those who have been unmeritedly attacked or injured. These are denominated prize courts, and the primary | object of their institution, is p. 283
to inquire whether a taking as prize, is sanctioned by the authority of their sovereign, or the unauthorised act of an individual. From this it would seem to follow, that the decision of such a court, is the only legal organ of communication, through which the sanction of a sovereign can be ascertained, and that no other court is at liberty to deny the existence of sovereign authority, for a seizure which a prize court has declared to be the act of its sovereign.

The propriety of such an act may correctly become the subject of executive or diplomatic discussion; but the equality of nations forbids that the conduct of one sovereign, or the correctness of the principles upon which he acts, should be submitted to the jurisdiction of the courts of another. From these considerations I infer, that the capture and continued possession of *The Sarah* and her cargo, confirmed by the approbatory sentence of a court of the capturing power, vested a title in the claimant, which this court cannot, consistently with the law of nations, interpose its authority to defeat.

Having briefly stated the grounds upon which I originally formed, and now adhere to an opinion in favour of the claimants, I will consider the objections stated to the jurisdiction of the court, on the ground that the seizure was contrary to the law of nations.

It is admitted, if the court of St. Domingo had jurisdiction of the subject matter, that the condemnation completed the divestiture of property. But it is contended that the subject, in this case, was not within their jurisdiction, because it was seized for a cause not sanctioned by the law of nations. I am unfortunate enough to think that neither the premises nor the conclusion of this argument, are maintainable. The conclusion is subject to this very obvious objection, that it defeats the very end for which such courts were created.

To contend that a violation of the law of nations will take away the jurisdiction of a court, which sits and judges according to the law of nations, appears to approach very near to a solecism. The occurrence which gives it jurisdiction, takes it away. |

p. 284 If the object and end of constituting a prize court be to give redress against unlawful capture, and, as the books say, in such case to restore *velis levatis*, how can it make reparation to the injured individual if it loses its jurisdiction: because there has been an injury done to him, the court can give him no redress. The argument admits, that a capture consistent with the law of nations, would give jurisdiction, but how is the legality or illegality of a capture to be determined, unless a court can take jurisdiction of the case. The legality of the capture is the very point to which a court is to direct its inquiries, and yet that inquiry is arrested in its inception. The cause or circumstances of a capture can never be known to a court, without exercising jurisdiction on the subject. To maintain therefore, that prize courts can only exercise jurisdiction over captures, made consistently with the law of nations is, in effect, to deprive them of all jurisdiction, since it leaves no means of deciding the question on which their jurisdiction rests.

But the premises which lead to this conclusion, will be found no less exceptionable than the conclusion itself; and the propriety of taking into consideration the questions which form those premises very question-

able. The opinion of those of my brethren who maintain this doctrine, is founded upon two propositions.

1. That a nation cannot capture, on the high seas, a vessel which has within her territories, committed a breach of a municipal law.

2. That the condemnation in this case, was grounded on an offence against a municipal law.

To me it appears wholly immaterial on what grounds the decision be founded, if the case be within their jurisdiction. Indeed, this is fully admitted by those of the court, who maintain the doctrine that I am considering; but under the idea of examining the jurisdiction of the court, they appear to me to go farther and examine into the correctness of its decision. I do not deny that there are circumstances material to the effect of sentences of foreign prize courts, into which other courts may | inquire. p. 285
The authorities quoted on this point relate exclusively to two, viz.

1. Whether the court is held in the territory of the sovereign who constitutes it.

2. Whether the subject was *sub potestate* of the sovereign whose courts condemned it.

These circumstances have an immediate relation to the existence of the court, and of its power of acting upon the subject; but within its legitimate scope of action, the correctness of its proceedings, or of the rules of decision by which it is governed, cannot, in the nature of things, and consistently with the idea of perfect equality and independence, be subjected to the review of other courts.

The decisions of such courts do not derive their effect from their abstract justice; they are in this respect analogous to the acts of sovereignty. They are universally conclusive, because nowhere subject to revision. Among nations they are considered as entitled to the same validity as the decisions of municipal courts, within their respective territories, and preclude the rights of parties, although contrary to every idea of law, reason and evidence.

The court of St. Domingo being a court of co-ordinate authority with this, was equally competent to decide a question of jurisdiction arising under the law of nations. Had the question whether a seizure under municipal law, upon the high seas, was contrary to the law of nations—or, if contrary to the law of nations, whether the court could not therefore exercise jurisdiction upon it, been brought to the notice of that court, it is presumed that their decree would not have been void, because they maintained the negative of the proposition. Had it been made a question before that court, whether the laws of France authorised the capture of The Sarah at ten leagues distance from the coast, or whether in fact the vessel was not seized within two leagues of the coast, it is presumed that their decision upon these points would have been conclusive, whatever

p. 286 may be the | impression of this court from the evidence now before us. It is impossible for this court to pretend to a knowledge of all the facts by which the decree of that court may have been regulated. The decree itself shows that the whole evidence is not before us ; but if it were, that court is sole arbiter, both of the effect of testimony, and the credibility of witnesses. A similar observation may be made with regard to the laws of France, which much pains has been taken to prove, did not authorise this capture. How can this court be supposed to know all the laws, sovereign orders, or received principles which regulate the decisions of foreign courts. Such courts are best acquainted with the laws of their own government, and their decision upon the existence or effect of those laws must, in the nature of things, be conclusive in the eyes of other nations. Suppose that other courts were so far at liberty as to review the grounds upon which such decrees *profess* to proceed, the insufficiency of those grounds would not be conclusive against the correctness of such decisions, because they may be maintainable upon other grounds, not noticed, or even not known to the judge who pronounces them.

But if we are to look into the grounds upon which a decree is professedly founded, extravagant as that upon the case of The Sarah is said to be, there is one view in which it may admit of justification. General Ferrand in his preamble declares it to be his leading object to remove the contrariety of opinion which existed among the officers of government relative to existing laws, respecting captures of vessels taken upon the coasts of St. Domingo. If their judges thought proper to consider this arrete as only declaratory of pre-existing laws, and that the words in the first article, ' ceux expedié pour les portes en leur possession en sortant ' avec ou sans chargement,' authorised the capture of vessels outward bound, I know no reason that *we* can have to declare it a misconstruction or incorrect opinion, or, if incorrect, to nullify their decree on that account. The conclusiveness of a foreign sentence appears to be at an end, the moment other courts undertake to look into the cause for which a capture was made. If the possession of the captor is the possession of his sovereign,
p. 287 and his courts have a right therefore to adjudicate property captured, | or carried into a foreign port, it appears to me to be immaterial on what ground the capture is made. The fact of dispossession by sovereign authority, judicially ascertained, deprives all other courts of the right to act upon the case.

Upon these considerations I have adopted the opinion that we are not at liberty to enter into the inquiry, whether the capture of The Sarah was made in pursuance of belligerent or municipal rights. But if we are to enter into the inquiry, I am of opinion that the evidence before us plainly makes out a case of belligerent capture, and, though not so, that the capture may be justified, although for the breach of a municipal law.

In support of my latter position, both *principle*, and the *practice* of Great Britain and our own government may be appealed to.

The ocean is the common jurisdiction of all sovereign powers; from which it does not result that their powers upon the ocean exist in a state of suspension or equipoise, but that every power is at liberty upon the ocean to exercise its sovereign right, provided it does no act inconsistent with that general equality of nations which exists upon the ocean. The seizure of a ship upon the high seas, after she has committed an act of forfeiture within a territory, is not inconsistent with the sovereign rights of the nation to which she belongs, because it is the law of reason, and the general understanding of nations, that the offending individual forfeits his claim to protection, and every nation is the legal avenger of its own wrongs. Within their jurisdictional limits the rights of sovereignty are exclusive; upon the ocean they are concurrent. Whatever the great principle of self defence in its reasonable and necessary exercise will sanction in an individual in a state of nature, nations may lawfully perform upon the ocean. This principle, as well as most others, may be carried to an unreasonable extent; it may be made the pretence instead of the real ground of aggression, and then it will become a just cause of war. I contend only for its reasonable exercise. The act of Great Britain, of the 24 Geo. III. c. 47. is predicated upon these principles. It subjects vessels to | seizure, p. 288
which approach with certain cargoes on board, within the distance of four leagues of her coast, because it would be difficult, if not impossible to execute her trade laws, if they were suffered to approach nearer in the prosecution of an illicit design. But if they have been within that distance, they are afterwards subject to be seized on the high seas. They have then violated her laws and have forfeited the protection of their sovereign. The laws of the United States upon the subject of trade, appear to have been framed in some measure after the model of the English statutes; and the 29th section of the act of 1799, expressly authorises the seizure of a vessel that has, within the jurisdiction of the United States, committed an act of forfeiture, wherever she may be met with by a revenue cutter, without limiting the distance from the coast. So also the act of 1806, for prohibiting the importation of slaves, authorises a seizure beyond our jurisdictional limits, if the vessel be found with slaves on board, hovering on the coast; a latitude of expression that can only be limited by circumstances, and the discretion of a court, and in case of fresh pursuit, would be actually without limitation. Indeed, after passing the jurisdictional limits of a state, a vessel is as much on the high seas as if in the middle of the ocean; and if France could authorise a seizure at the distance of two leagues, she could at the distance of twenty.

But the capture of The Sarah may fairly be considered as an exercise of belligerent right, and strictly analogous to seizure for breach of blockade. The right of one nation to exclude all others from trading with her territories, exists equally in war and in peace. Had the exclusion in this case been merely calculated for the interests of trade, it may have been considered as purely municipal. But there existed a war between the parent state and her colony. It was not only a fact of the most universal notoriety, but officially notified in the gazettes of the United States, by the proclamation of the French resident M. Pichon, who at the same time publishes the prohibition to trade with the revolters, with a declaration that seizure and confiscation should be the consequence of disobedience to this prohibition. Here then was
p. 289 notice of the existence of war, and an assertion | of the rights consequent upon it. The object of the measure was not the promotion of any particular branch of agriculture, manufacture, or commerce, but solely the reduction of an *enemy*. It was therefore not merely municipal, but belligerent in its nature and object. If France had a right to subdue the revolted colony, she had an undoubted right to preclude all nations from supplying them with the means of protracting the war. To confine her to her own jurisdictional limits, in the exercise of those acts of force which were necessary to carry into effect her right of excluding neutrals, would be a mere mockery, when by the very state of things she was herself shut out from those limits. Seizure on the high seas for a breach of the right of blockade, during the whole return voyage, is universally acquiesced in as a reasonable exercise of sovereign power. The principle of blockade has indeed in modern times been pushed to such an extravagant extent as to become a very justifiable cause of war, but still it is admitted to be consistent with the law of nations, when confined within the limits of reason and necessity. The right to subdue an enemy, carries with it the right to make use of the necessary means for that purpose, and the individual who does an act inconsistent with the rights of a belligerent, exposes himself to the liability to be treated as an enemy. The belligerent nation can exercise the same acts of violence against him that she can against an individual of her enemy. Nor can his sovereign protect an individual who has committed an aggression upon belligerent rights without becoming a party to the contest.

The argument drawn from the decree of Ferrand, to prove that France had not asserted her belligerent rights, is evidently founded upon a mistranslation. The sentence which authorises the seizure of vessels when outward bound, after having entered the ports of St. Domingo, is *substantive*, and totally unaffected by the subsequent sentence, which authorises a seizure of vessels sailing within two leagues of the coast. The former authorises capture for the offence of having entered those

ports ; the latter, for being found in a situation from which an intention to commit that offence shall be inferred. Nor, if the fact were so, that she had limited the right of capture to two leagues from her coast, would | it follow that this was an exercise of municipal right ; because a nation may p. 290 restrict her subjects, in the exercise of belligerent rights, to a certain distance from the coast, or even to her jurisdictional limits, and yet the character of the seizure would be in no wise changed. If the object of the seizure is to promote the reduction of an enemy, it is an exercise of the rights of war.

From these considerations I conclude that the capture of The Sarah was justifiable upon principles not at all dependent upon municipal regulation ; that it may fairly be considered as having been made in conformity with the law of nations, and, therefore, without acceding to the doctrine that a seizure contrary to the law of nations was a void seizure, and that we have a right to declare that a mere marine trespass which a court of France has declared to be the act of its sovereign, I conclude that the court of St. Domingo had jurisdiction in this case ; and if it had jurisdiction, it is admitted that the property was altered, and the libellant ought not to recover.

Let it be observed that this is not an application on behalf of the vendee of the captor for the aid of this court to secure to him the benefit of his purchase. We find him in possession, and the application is for our aid to divest that possession, and restore it to the original owner. This owner was clearly an offender against the rights of France, and his only claim upon the interference of this court is, that he had escaped, with the property thus acquired, beyond two leagues from the shore of the nation that he had offended. In such a case it would be enough for all the purposes of the defendant, if this court would imitate the state of our nation, and remain neutral between the parties.

Let it not be supposed that the opinion which I am giving devotes the commerce of our country to lawless depredation. My observations are applied to a case in which an evident aggression has been committed, by entering at least two of the interdicted ports of St. Domingo. The individual who will knowingly violate the rights of war, or laws of trade of another nation, is well apprised that he forfeits all claim to the protection of his country, or the interference of its courts. The peace of | the nation, and the interests of the fair trader, imperiously require that p. 291 the smuggler, or the violator of neutrality, should be left to his fate.

If I had no other reason to satisfy my mind of the correctness of the doctrines that I have been contending for, a conviction of their importance to the peace and security of the mercantile world would alone induce me to maintain them. The purchase of these goods was made in a Spanish port, under sanction of an agent of the French government, apparently countenanced by the government of the country in which

he acted, and is sanctioned by a condemnation. If in the purchase of articles of merchandize in a foreign port, under the sanction of sovereign authority, it is nevertheless necessary, in order to acquire a good property, that a merchant should know whether they were captured by law or without law, under the law of nations, or under municipal law, the office of a lawyer will be as necessary to his education as the counting house. Articles of commerce passing from hand to hand by mere delivery, often remaining for years in the same packages, distinguished by the same marks, may admit of identification after any length of time, in the remotest countries, and in the hands of the most innocent purchasers. But if a seizure by a sovereign, upon a ground which any court may adjudge unsanctioned by the law of nations, is tantamount to no seizure, and nothing done in pursuance of it can transfer a good property, where is the uncertainty to end? With regard to ships the inconvenience may not be so great. Every merchant knows that a vessel must be accompanied with her document papers, so that the purchaser may come to the knowledge of her having passed through a capture and condemnation, and be put on his guard against so precarious a title. He will know that he is liable to be dispossessed according to the varying constructions of the law of nations that may prevail in different countries; yet he knows the full value of a property thus embarrassed. But in the purchase of merchandize he has no security, unless indeed he purchases them immediately from the manufacturer or the planter. It is a subject of curious speculation how far the pursuit or research after merchandize thus situated may be carried; whether the same principle
p. 292 may not extend it into the | hands of the retailer or even the consumer. In one of the cases arising out of the capture of The Sarah, I mean that against Groning, the property is libelled in the hands of a purchaser without notice, after it was landed in this country. If we can go so far, I see not where we are to stop. Every subsequent purchaser, even the remotest, as far as the article will admit of identification, is in no better situation than the defendant Groning, and liable, upon the same principle, to be dispossessed. After going beyond the fact of seizure by sovereign authority within his own territory, (where he is supreme,) or upon the ocean, (where he is equal to all others,) unaffected by escape, recapture or release, (by which property is restored to its state before seizure,) the approbatory sentence of his own court—(by which alone it can be judicially known to be the act of the sovereign)—beyond these limits every step that a court takes can only be productive of doubt, litigation and uncertainty, and involve the commercial world in endless embarrassment, at the same time that it compromits the peace of nations, among whom it is a received and correct opinion, that a want of due deference to the jurisdiction of their maritime courts is a just cause of war.

Sentence of the Court, March 2, 1808.

This cause came on to be heard on the transcript of the record, and on sundry exhibits introduced into the case in this court, and was argued by counsel, on consideration whereof, it appearing that The Sarah with her cargo were seized without the territorial jurisdiction claimed by the French government of St. Domingo, for the breach of a municipal regulation, and having never been carried within that jurisdiction, were sold by the captor in a foreign port, and afterwards condemned by the court of St. Domingo, as having violated the laws for regulating the commerce of French and foreign vessels with that colony, which laws authorise a seizure of vessels found within two leagues of the coast; it is the opinion of the court, that the seizure of The Sarah and her cargo is to be considered as a marine trespass, not vesting the possession in the sovereign of the captor, or | giving jurisdiction to the court which passed p. 293
the sentence of condemnation, and, therefore, that the said sentence did not change the property in The Sarah and her cargo, which ought to be restored to the plaintiffs, the original owners, subject to those charges of freight, insurance and other expenses which would have been incurred by the owners in bringing the cargo into the United States, which equitable deductions the defendants are at liberty to show in the circuit court. This court is therefore of opinion, that the sentence of the circuit court of South Carolina ought to be reversed, and the cause be remanded to that court, in order that a final decree may be made therein, conformably to this opinion.

Hudson and others v. Guestier, and Lafont v. Bigelow.

(4 Cranch, 293) 1808.

If a vessel, seized by a French privateer, within the territorial jurisdiction of the government of St. Domingo, for breach of the French municipal law prohibiting all intercourse with certain ports in that island, be carried by the captors directly to a Spanish port in the island of Cuba, she may, while lying there, be lawfully proceeded against and condemned by a French tribunal sitting at Guadaloupe.

The possession of the sovereign of the captors, gives jurisdiction to his courts. The possession of the captors in a neutral port is the possession of their sovereign. If the possession be lost by *recapture, escape,* or *voluntary discharge,* the courts of the captor lose the jurisdiction which they had acquired by the seizure.

The trial of a municipal seizure must be regulated exclusively by municipal law. No foreign court can question the correctness of what is done, unless the court passing the sentence, loses its jurisdiction by some circumstance which the law of nations can notice.

THESE cases were argued in connexion with that of *Rose* v. *Himely.*

MARSHALL, Ch. J. delivered the opinion of the court, as follows:

This case differs from that of Rose v. Himely in one material fact. The vessel and cargo, which constitute the subject of controversy, were

seized *within the territorial jurisdiction of the government of St. Domingo*, and carried into a *Spanish* port. While lying in that port, proceedings were regularly instituted in the court for the *island of Guadaloupe*, the cargo was sold by a provisional order of that court, after which the vessel and cargo were condemned. The single question, therefore, which exists in this case is, did the court of the captor lose its jurisdiction over the captured vessel by its being carried into a Spanish port. |

p. 294 The seizure was indisputably a valid seizure, and vested the lawful possession of the vessel in the sovereign of the captor. The right consequently existed in full force to apply immediately to the proper tribunals for an examination of, and decision on the offence alleged to have been committed. The jurisdiction of those tribunals had attached, and this right to decide upon the offence was complete.

When a seizure is thus made for the violation of a municipal law, the mode of proceeding must be exclusively regulated by the sovereign power of the country, and no foreign court is at liberty to question the correctness of what is done, unless the court passing the sentence loses its jurisdiction by some circumstance which the law of nations can notice. Recapture, escape, or a voluntary discharge of the captured vessel would be such a circumstance, because the sovereign would be thereby deprived of the possession of the thing, and of his power over it. While this possession remains, the *res* may be either restored or sold, the sentence of the court can be executed, and therefore this possession seems to be the essential fact on which the jurisdiction of the court depends.

The laws of the United States require that a vessel which has been seized for violating them should be tried in the district where the offence is committed, and certainly it would be irregular and illegal for the tribunal of a different district to act upon the case. But of this irregularity, it is believed, no foreign court could take notice. The United States might enable the admiralty courts of one district to decide on captures made for offences committed in another district. It is an internal regulation, to be expounded by our own courts, and of which the law of nations can take no notice. The possession of the thing would be in the sovereign power of the state, and it is competent to that power to give jurisdiction over it to any of its tribunals. There exists a full power over the subject, and an ability to execute the sentence of the court. The sovereign power possessing jurisdiction over the thing, must be presumed by foreign tribunals to have exercised that jurisdiction properly. But if the *res* be out of the power of the sovereign, he cannot act upon it, nor delegate authority to act upon it to his courts. |

p. 295 If these principles be correct, it remains to inquire whether the brig Sea Flower remained in the possession and in the power of the sovereign of the captor after being carried into a Spanish port.

Had this been a prize of war, we have precedents and principles which would guide us. The cases cited from Robinson's Reports, and the regulations made by Louis XVI. in November, 1779, show that the practice of condemning prizes of war while lying in neutral ports has prevailed in England, and has been adopted in France. The objections to this practice may perhaps be sufficient to induce nations to change it by common consent, but until they change it the practice must be submitted to, and the sentence of condemnation passed under such circumstances will bind the property, unless the legislature of the country in which the captured vessel may be claimed, or the law of nations, shall otherwise direct.

The sovereign whose officer has in his name captured a vessel as prize of war, remains in possession of that vessel, and has full power over her, so long as she is in a situation in which that possession cannot be rightfully divested. The fact whether she is an enemy vessel or not ought however to be judicially inquired into and decided, and therefore the property in a neutral captured as an enemy is never changed until sentence of condemnation has passed ; and the practice of nations requires that the vessel shall be in a place of safety before such sentence can be rendered. In the port of a neutral she is in a place of safety, and the possession of the captor cannot be lawfully divested, because the neutral sovereign, by himself or by his courts, can take no cognizance of the question of prize or no prize. This position is not intended to apply to the case of a sovereign bound by particular treaties to one of the belligerents ; it is intended to apply only to those neutrals who are free to act according to the general law of nations. In such case the neutral sovereign cannot wrest from the possession of the captor a prize of war brought into his ports.

A vessel captured as prize of war is then, while lying in the port of a neutral, still in the possession of the sovereign | of the captor, and that p. 296
possession cannot be rightfully divested.

It is objected that his courts can take no jurisdiction of a vessel under such circumstances, because they cannot enforce a sentence of restitution.

But it is to be recollected that the possession of the captor is in principle the possession of his sovereign ; he is commissioned to seize in the name of the sovereign, and is as much an officer appointed for that purpose, as one who in the body of a county serves a civil process. He is under the controul and direction of the sovereign, and must be considered as ready to obey his commands legally communicated through his courts.

It is true that in point of fact cruisers are often commanded by men who do not feel a due respect for the laws, and who are not of sufficient responsibility to compensate the injuries their improper conduct may

occasion; but in principle they must be considered as officers commissioned by their sovereign to make a seizure in the particular case, and to be ready to obey the legitimate mandate of the sovereign directing a restitution. The property therefore may be restored while lying in a neutral port, and whether it may or may not be sold in the neutral port, the condemnation without a sale may change the property, if such condemnation be valid.

In cases of prize of war, then, the difficulty of executing the sentence does not seem to afford any conclusive argument against the jurisdiction of the court of the captor over a vessel in possession of the captor, but lying in a neutral or friendly port.

Do the same principles apply to a seizure made within the territory of a state for the violation of its municipal laws?

In the solution of this question the court can derive no aid from precedent. The case perhaps has only occurred in the wars which have been carried on since the year 1793, and the court in deciding it finds itself reduced to the necessity of reasoning from analogy. |

p. 297 The seizure, it has been already observed, vests the possession in the sovereign of the captor, and subjects the vessel to the jurisdiction of his courts. The vessel, when carried into a foreign port, is still in his possession, and he is as capable of restoring it if the offence should not have been committed, as he is of restoring a neutral vessel unjustly captured as an enemy. The sentence in the one case may be executed with as much facility as in the other.

Possession of the *res* by the sovereign has been considered as giving the jurisdiction to his court; the particular mode of introducing the subject into the court, or, in other words, of instituting the particular process which is preliminary to the sentence, is properly of municipal regulation, uncontrouled by the law of nations, and therefore is not examinable by a foreign tribunal. It would seem then that the principles which have been stated as applicable in this respect to a prize of war, may be applied to a vessel rightfully seized for violating the municipal laws of a nation, if the sovereign of the captor possesses the same right to maintain his possession against the claim of the original owner in the latter as in the former case. If, on a libel filed by the original owner in the courts of the country into which the vessel might be brought, the possession could be defended by alleging that she was seized for the violation of a municipal law, and the right of the court to decide the cause would be thereby defeated, then that possession would seem to be sufficiently firm to maintain the jurisdiction of the courts of the captor.

Upon this point much doubt has been entertained. It is, however, the opinion of a majority of the judges, that a possession thus lawfully acquired under the authority of a sovereign state could not be divested

by the tribunals of that country into whose ports the captured vessel was brought; at least that it could not be divested unless there should be such obvious delay in proceeding to a condemnation as would justify the opinion that no such measure was intended, and thus convert the seizure into a trespass.

The judgment of the circuit court is to be reversed. |

CHASE and LIVINGSTON, Justices, dissented from the opinion of the p. 298
court in these cases, because the vessel, which was seized for the violation of a French arrete or municipal regulation, was not brought into any port of France for trial, but was voluntarily carried by the captain of the privateer to St. Jago de Cuba, a Spanish port, and while lying there was, with her cargo, condemned as forfeited by a French tribunal sitting at *Guadaloupe*.

JOHNSON, J. I concur in the reversal of the decision in the court below, but on different grounds from those which influence the opinion of my brethren. I had occasion in the case of The Sarah to express my ideas on most of the points arising in this case, and to that opinion I refer for the reasons of my present conclusion.

To me it appears immaterial whether the capture was made in exercise of municipal or belligerent rights, or whether within the jurisdictional limits of France, where she is supreme, or beyond those limits and upon the high seas, where her authority is concurrent with that of every other nation. We find the property in possession of the captor, under authority derived from his sovereign, whose conduct cannot be submitted to our jurisdiction.

The modern practice of nations sanctions the condemnation of vessels lying in a foreign port, and that practice is not inconsistent with principle.

The plaintiff below has lost all remedy at law, and must look elsewhere for redress if he has sustained an injury.

Croudson and others v. Leonard.

(4 Cranch, 434) 1808.

The sentence of a foreign court of admiralty condemning a vessel *for breach of blockade*, is *conclusive* evidence of that fact in an action on the policy of insurance.

ERROR to the circuit court of the district of Columbia; in an action on a policy of insurance on the cargo of the brig Fame, on a voyage from Alexandria, to, at, and from *Barbadoes* and four other ports in the West-Indies, and back to Alexandria, the vessel and cargo warranted American property. The vessel arrived at Barbadoes, and sailed from thence for Antigua, but on her voyage to that island was captured by a British vessel, and carried into Barbadoes, and there condemned in

the vice-admiralty court, for attempting to break the blockade of *Martinique*.

The jury found a special verdict, upon which the judgment below was in favour of the plaintiffs.

The only question arising upon this special verdict was, whether the sentence of the court of vice-admiralty was conclusive evidence of an attempt to violate the blockade of Martinique.

This question having been several times argued, (but not decided,) in the case of *Fitzsimmons* v. *The Newport Insurance Company*, at this term, (8 Cranch, 185.) the counsel submitted it to the court without further argument.

March 15.

JOHNSON, J. The action below was instituted on a policy of insurance.

On behalf of the insurers, it was contended that the policy was forfeited by committing a breach of blockade. It is not, and cannot be made a question, that this is one of those acts which will exonerate the underwriters from their liability. The only point below was relative to
p. 435 the evidence upon which the commission of | the act may be substantiated. A sentence of a British prize court in Barbadoes was given in evidence, by which it appeared that the vessel was condemned for attempting to commit a breach of blockade. It is the English doctrine, and the correct doctrine on the law of nations, that an attempt to commit a breach of blockade is a violation of belligerent rights, and authorises capture. This doctrine is not denied, but the plaintiff contends that he did not commit such an attempt, and the court below permitted evidence to go to the jury to disprove the fact on which the condemnation professes to proceed.

On this point, I am of opinion that the court below erred.

I do not think it necessary to go through the mass of learning on this subject, which has so often been brought to the notice of this court, and particularly in the case of *Fitzsimmons*, argued at this term. Nearly the whole of it will be found very well summed up in the 18th chapter of Mr. Park's Treatise. The doctrine appears to me to rest upon three very obvious considerations: the propriety of leaving the cognizance of prize questions exclusively to courts of prize jurisdiction—the very great inconvenience amounting nearly to an impossibility of fully investigating such cases in a court of common law—and the impropriety of revising the decisions of the maritime courts of other nations, whose jurisdiction is co-ordinate throughout the world.

It is sometimes contended that this doctrine is novel, and that it takes its origin in an incorrect extension of the principle in *Hughes* v. *Cornelius*. I am induced to believe that it is coeval with the species of contract to which it is applied. Policies of insurance are known to have been brought

into England from a country that acknowledged the civil law. This must have been the law of policies at the time when they were considered as contracts proper for the admiralty jurisdiction, and were submitted to the court of policies established in the reign of Elizabeth. It is probable that, at the time when the common law assumed to itself exclusive jurisdiction of the contract of insurance, the rule was | too much blended with the law p. 436
of policies to have been dispensed with, had it even been inconsistent with common law principles. But, in fact, the common law had sufficient precedent for this rule, in its own received principles relative to sentences of the civil law courts of England. It may be true that there are no cases upon this subject prior to that of *Hughes* v. *Cornelius*, but this does not disprove the existence of the doctrine. There can be little necessity for reporting decisions upon questions that cannot be controverted. Since the case of *Hughes* v. *Cornelius*, the doctrine has frequently been brought to the notice of the courts of Great Britain in insurance cases, but always with a view to contest its applicability to particular cases, or to restrict the general doctrine by exceptions, but the existence of the rule, or its applicability to actions on policies, is no where controverted.

I am of opinion that the sentence of condemnation was conclusive evidence of the commission of the offence for which the vessel was condemned, and as that offence was one which vitiated the policy, the defendants ought to have had a verdict.

WASHINGTON, J. The single question in this case is, whether the sentence of the admiralty court at Barbadoes, condemning the brig Fame and her cargo as prize, for an attempt to break the blockade of Martinique, is conclusive evidence against the insured, to falsify his warranty of neutrality, notwithstanding the fact stated in the sentence as the ground of condemnation is negatived by the jury?

This question has long been at rest in England. The established law upon this subject in the courts of that country is, that the sentence of a foreign court of competent jurisdiction condemning the property upon the ground that it was not neutral, is so entirely conclusive of the fact so decided, that it can never be controverted, directly or collaterally, in any other court having concurrent jurisdiction.

This doctrine seems to result from the application of a legal principle which prevails in respect to domestic | judgments, to the judgments and p. 437
sentences of foreign courts.

It is a well established rule in England, that the judgment, sentence, or decree of a court of exclusive jurisdiction directly upon the point, may be given in evidence as conclusive between the same parties, *upon the same matter* coming incidentally in question in another court for a different purpose. It is not only conclusive of the *right* which it establishes, but of *the fact* which it directly decides.

This rule, when applied to the sentences of courts of admiralty, whether foreign or domestic, produces the doctrine which I am now considering, upon the ground that all the world are parties in an admiralty cause. The proceedings are *in rem*, but any person having an interest in the property may interpose a claim, or may prosecute an appeal from the sentence. The insured is emphatically a party, and in every instance has an opportunity to controvert the alleged grounds of condemnation, by proving, if he can, the neutrality of the property. The master is his immediate agent, and he is also bound to act for the benefit of all concerned, so that, in this respect, he also represents the insurer. That irregularities have sometimes taken place, to the exclusion of a fair hearing of the parties, is not to be denied. But this furnishes no good reason against the adoption of a general rule. A spirit of comity has induced the courts of England to presume that foreign tribunals, whether of prize or municipal jurisdiction, will act fairly, and will decide according to the laws which ought to govern them ; and public convenience seems to require that a question, which has once been fairly decided, should not be again litigated between the same parties, unless in a court of appellate jurisdiction.

The irregular and unjust decisions of the French courts of admiralty of late years, have induced even English judges to doubt of the *wisdom* of the above doctrine in relation to foreign sentences, but which they have acknowledged to be too well established for English tribunals to
p. 438 shake ; and the justice with which the same charge is made by all neutral nations against the English as well as against the French courts of admiralty, during the same period, has led many American jurists to question *the validity* of the doctrine in the courts of our own country. It is said to be a novel doctrine, lately sprung up, and acted upon as a rule of decision in the English courts, since the period when English decisions have lost the weight of authority in the courts of the United States. It is this position which I shall now examine, acknowledging that I do not hold myself bound by such decisions made since the revolution, although, as evidence of what the law was prior to that period, I read and respect them.

The authority of the case of *Hughes* v. *Cornelius*, the earliest we meet with as to the conclusiveness of a foreign sentence, is admitted ; but its application to a question arising under a warranty of neutrality between the insurer and insured, is denied. It is true that, in that case, the only point expressly decided was, that the sentence was conclusive as to the change of property effected by the condemnation. But it is obvious that the point decided in that case depended, not upon some new principle peculiar to the sentences of foreign courts, but upon the application of a general rule of law to such sentences.

This case, as far as it goes, places a foreign sentence upon the same foundation as the sentence or decree of an English court acting upon the same subject; and we have seen that, by the general rule of law, the latter, if conclusive at all, is so as *to the fact directly decided*, as well as to the change of property produced by the establishment of the fact. Hence it would seem to follow, that if the sentence of a foreign court of admiralty be conclusive as to the property, it is equally conclusive of the matter or fact directly decided. What is *the matter* decided in the case under consideration?—That the vessel was seized whilst attempting to break a blockade, in consequence of which she lost her neutral character; and the change of property produced by the sentence of condemnation is a consequence of the matter decided, that she was, in effect, enemy-property. Can the parties to that sentence be bound by so much of | it p. 439
as works a loss of the property, because it was declared to be enemy-property, and yet be left free to litigate anew in some other form, the very point decided from which this consequence flowed? Or upon what just principle, let me ask, shall a party to a suit, who has once been heard, and whose rights have been decided by a competent tribunal, be permitted in another court of concurrent jurisdiction, and, in a different form of action, to litigate the same question, and to take another chance for obtaining a different result? I confess I am strongly inclined to think that the case of *Hughes* v. *Cornelius* laid a strong foundation for the doctrine which was built upon it, and which for many years past has been established law in England. This opinion is given with the more confidence, when I find it sanctioned by the positive declarations of distinguished law characters—men who are, of all others, the best able to testify respecting the course of decisions upon the doctrine I am examining, and the source from which it sprung.

In the case of *Lothian* v. *Henderson*, 3 *Bos. & Pull.* 499. *Chambre*, J. speaking upon this point, says that the sentence of the French court was in that case conclusive against the claim of the assured, 'agreeable to all the decisions upon the subject, beginning with the case of *Hughes* v. *Cornelius*, (confirmed as that was by the opinion of Lord *Holt* in two subsequent cases,) and pursuing them down to the present period. It is true,' he observes, 'that in *Hughes* v. *Cornelius*, the question upon the foreign sentence arose in an action of trover, and not in an action on a policy of assurance, where the non-compliance with a warranty of neutrality is in dispute. But from that period to the present, the doctrine there laid down respecting foreign sentences has been considered equally applicable to questions of warranty in actions on policies, as to questions of property in actions of trover.' *Le Blanc*, J. says, 'that these sentences are admissible and conclusive evidence of the fact they decide, it seems not safe now to question: From the time of *Car.* II. to this day, they

have been received as such, without being questioned. In the discussion
p. 440 of the nature of such evidence before this | house in 1776, it seems not to have been controverted; and the cases, I may say, are numberless, and the property immense which have been determined on the conclusiveness of such evidence, in many of which cases, the forms in which they came before the courts in Westminster-Hall were such as to have enabled the parties, if any doubt had been entertained, to have brought the question before a higher tribunal.' *Lawrence*, J. also speaking of the legal effect of a foreign sentence upon this point, says, 'as to which, after the continued practice which has taken place from the *earliest period*, in which, in actions on policies of insurance, questions have arisen on warranties, to admit such sentences in evidence, not only as conclusive *in rem*, but also as conclusive of the several matters they purport to decide directly, I apprehend it is now too late to examine the practice of admitting them to the extent to which they have been received, supposing that practice might, upon the argument, have appeared to have been doubtful at first.' *Rooke*, J. Lord *Eldon*, and Lord *Alvanley*, all concur in giving the same testimony, that the doctrine under consideration had been established for a long period of years, by a long series of adjudications in the courts of Westminster-Hall.

I cite this case for no other purpose but to prove by the most respectable testimony, that the case of *Hughes* v. *Cornelius*, decided in the reign of *Car.* II. had, by a uniform course of decisions from that time, been considered as warranting the rule now so firmly established in England. And when the inquiry is, whether the application of the principle laid down in that case to questions arising on warranties in actions on policies, be of ancient or modern date, I think I may safely rely upon the declarations of the English judges, when they concur in the evidence they give respecting the fact. It is true that no case was cited at the bar recognizing the application of the rule to questions between the insurer and insured, prior to the revolution, except that of *Fernandez* v. *Da Costa*, which I admit was a *Nisi Prius* decision. But were I convinced that the long series of decisions upon this point, from the time of *Hughes* v. *Cornelius*, spoken of by the judges in the case of *Lothian* v. *Henderson*, had been
p. 441 made at *Nisi Prius*, it | would not, in my mind, weaken the authority of the doctrine. It would prove the sense of all the judges of England, as well as of the bar, of the correctness and legal validity of the rule. It is not to be supposed that if a doubt had existed respecting the law of those decisions, the point would not have been reserved for a more deliberate examination, before some of the courts of Westminster-Hall. But the case of *Fernandez* v. *Da Costa* receives additional weight, when it is recollected that the judge who decided it was Lord *Mansfield*, and when upon examining it, we find no intimation from him that there was any

novelty at that day in the doctrine. To this strong evidence of the antiquity of the rule, may be added that of Judge *Buller*, who, at the time he wrote his *Nisi Prius*, considered it as then established.

That the doctrine was considered as perfectly fixed in the year 1781, is plainly to be inferred, from the case of *Bernardi* v. *Motteux*, decided in that year. Lord *Mansfield* speaks of it as he would of any other well established principle of law, declaring in general terms, that the sentence, as to that which is within it, is conclusive against all persons, and cannot be collaterally controverted in any other suit. The only difficulty in that case was, to discover the real ground upon which the foreign sentence proceeded, and the court in that and many subsequent cases laid down certain principles auxiliary to the rule, for the purpose of ascertaining the real import of the sentence in relation to the fact decided as between the insurer and insured. For if the sentence did not proceed upon the ground of the property not being neutral, it of course concluded nothing against the insured ; since upon no other ground could the sentence be said to falsify the warranty.

It was admitted by the counsel for the insured, that, as between him and the insurer, the sentence is *prima facie* evidence of a non-compliance with the warranty. But if they are right in their arguments as to the inconclusiveness of the sentence, I would ask for the authority upon which the sentence can be considered as *prima facie* evidence. Certainly no case was referred | to, and I have not met with one to warrant the position. p. 442
If we look to general principles applicable to domestic judgment, they are opposed to it. We have seen that the judgment is conclusive between the same parties, upon the same matter coming incidentally in question. The judgment of a foreign court is equally conclusive, except in the single instance where the party claiming the benefit of it applies to the courts in England to enforce it, in which case only the judgment is *prima facie evidence*. But it is to be remarked, that in such a case, the judgment is no more conclusive as to the right it establishes, than as to the fact it decides. Now it is admitted that the sentence of a foreign court of admiralty is conclusive upon the right to the property in question ; upon what principle, then, can it be *prima facie* evidence, if not *conclusive*, upon the facts directly decided. A domestic judgment is not even *prima facie* evidence between those not parties to it, or those claiming under them, and that would clearly be the rule, and for a similar reason as to foreign judgments. If between the same parties, the former is conclusive as to the right and as to the facts decided. This principle, if applied at all to foreign sentences, which it certainly is, is either applicable throughout, upon the ground that the parties are the same, or if not so, then by analogy to the rule applying to domestic judgments, the sentence cannot be evidence at all.

Upon the whole, I am clearly of opinion, that the sentence of the court of admiralty at Barbadoes, condemning the brig Fame and her cargo as prize, on account of an attempt to break the blockade of Martinique, is conclusive evidence in this case against the insured, to falsify his warranty of neutrality.

If the injustice of the belligerent powers, and of their courts, should render this rule oppressive to the citizens of neutral nations, I can only say with the judges who decided the case of *Hughes* v. *Cornelius*, let the government in its wisdom adopt the proper means to remedy the mischief. I hold the rules of law, when once firmly established, to be beyond the
p.443 controul | of those who are merely to pronounce what the law is, and if from any circumstance it has become impolitic, in a national point of view, it is for the nation to annul or to modify it. Till this is done, by the competent authority, I consider the rule to be inflexible.[1]

Yeaton v. Fry.

(5 Cranch, 335) 1809.

If the insurance be 'against all risks, *blockaded ports and Hispaniola excepted*,' a vessel sailing ignorantly for a blockaded port is covered by the policy. The exception is not of the *port*, but of the *risk of capture* for breaking the blockade.

Copies of the proceedings in the vice-admiralty court of Jamaica are admissible in evidence when certified under the seal of the court by the deputy registrar, who is certified by the judge of the court, who is certified by a notary public.

Depositions, taken under a commission issued at the instance of the *defendant*, may be read in evidence by the *plaintiff*, although the plaintiff had not notice of the time and place of taking the same.

A vessel sailing ignorantly to a blockaded port, is not liable to capture under the law of nations.

Error to the circuit court of the district of Columbia, in an action on the case upon a policy of insurance on the brig *Richard, at and from Tobago to one or more ports in the West Indies, and at and from thence to Norfolk.* The following clause was inserted in the body of the policy. '*This insurance is declared to be made against all risks, blockaded ports and Hispaniola excepted.*' And at the foot of the policy was the following memorandum: '*Warranted* by the assured *free from any charge, damage or loss*, which may arise in consequence of *seizure* or *detention* of the property, *for or on account of illicit or prohibited trade.*'

On the trial of the general issue, four bills of exception were taken in the court below by the plaintiff in error.

1. The first was to the admission in evidence of certain copies of the proceedings and decree of the vice-admiralty court at Jamaica, ordering

[1] Judge *Chase* and *Livingston* dissented; and Judge *Todd*, not having been present at the argument, gave no opinion. So that this judgment is reversed by the opinions of *Marshall*, Ch. J. *Cushing*, *Washington*, and *Johnson*, Justices.

a sale to pay the salvage of the brig. The copies were authenticated by the following certificates, viz. 'Jamaica, *ss.* I, Adam Dolmage, Esq. deputy of Owsley Rowley, Esq. chief registrar and scribe of the acts, causes and businesses of the court of vice-admiralty within the said island, duly constituted, appointed and sworn, do hereby certify and make known to all whom it doth or may concern, that the several sheets of paper writing hereunto annexed, in number fifteen, and marked or numbered from No. 1. to No. 15. inclusive, do contain a true copy and transcript of certain process and proceedings, had, moved, and prosecuted to interlocutory decree in the said court, in a certain cause therein lately depending, entitled, 'Brig Richard, Jacobs, master.' In which cause Benjamin Jacobs hath duly | filed his claim thereto in the said court; p. 336
and I further certify, that I have carefully compared and examined the same with the originals remaining of record in my office.

'In faith and testimony of the truth whereof, I the said Adam Dolmage have hereunto set my hand; and the seal of the said court of vice-admiralty hath been caused to be hereunto affixed in the city of Kingston, in the said island, the seventh day of January, one thousand, eight hundred and seven.

'ADM. DOLMAGE, *Dep. Reg. Vic. Cur. Adm.*'

'Jamaica, *ss.* I, Henry John Hinchliffe, Esq. judge and commissary of the court of vice-admiralty, in the island of Jamaica, do hereby certify and make known to all whom it may concern, that Adam Dolmage, Esq. who has signed and attested the certificate hereunto annexed, is deputy registrar of the said court of vice-admiralty, and that to all acts and instruments by him signed and attested, in such his capacity, due faith and credit is and ought to be given in judgment, court, and without. In testimony whereof, I have hereunto set my hand, and caused the seal of the court of vice-admiralty aforesaid to be affixed, this sixteenth day of September, 1807.

(Seal.) 'Henry John Hinchliffe.'

'Jamaica, *ss.* I, Robert Robertson, secretary, and notary public, of this his majesty's island of Jamaica, duly admitted, allowed and sworn, dwelling in the city of Kingston, in the county of Surrey, and island aforesaid, do hereby certify and make known to all whom these presents may concern, that Henry John Hinchliffe, Esq. by whom the annexed certificate is signed, is judge and commissary of the court of vice-admiralty of the island of Jamaica aforesaid, and that to all acts and instruments in writing by him the said Henry John Hinchliffe, Esq. attested, due faith and credit is and ought to be given. In testimony whereof, I, the said notary, have hereunto | affixed my hand and seal of office, at Kingston aforesaid, this p. 337
fifth day of October, *Anno Domini* one thousand, eight hundred and seven.

(Seal.) 'Rob. Robertson, Sec. and N. Pub.'

It was further testified by competent witnesses, examined upon oath by the court, that the said Henry J. Hinchliffe, in the year 1804, publicly sat as a judge of, and held the court of vice-admiralty in Jamaica, and in that capacity condemned the vessel of one of the witnesses, who, in the island of Jamaica, received from his proctor a copy of the proceedings in the said court in his cause, which copy was authenticated in the same manner as the paper now offered in evidence, and under a similar seal; and that upon producing that copy to the underwriters in Alexandria and in Philadelphia, the loss was paid without delay. That similar papers, purporting to be copies of proceedings in the same court of vice-admiralty in other cases, had been received in this country by other persons, and had been considered by both insurers and insured as authentic papers, and losses had been paid thereon; and that the present paper was shown to the defendant, who did not object to its authentication, but refused to pay the loss for other reasons. But neither of the witnesses had ever seen the judge write, nor the act of affixing the seal of the court to any paper.

2. The second bill of exceptions stated, in substance, that the defendant (the plaintiff in error) prayed the court to instruct the jury, that if at the time the brig Richard sailed from Tobago for Curraçoa, the latter island was actually blockaded, and the brig turned away by the blockading force, and afterwards lost, without again attempting to enter Curraçoa, and in the prosecution of her voyage to Norfolk, the plaintiff below was not entitled to recover, although no official notification of such blockade was ever published, and although the master of the brig was
p. 338 ignorant of such blockade | until he met with the blockading force. Which instruction the court refused to give.

3. The third bill of exceptions stated, that the plaintiff below offered to read in evidence certain depositions taken in Tobago, under a commission issued at the instance of the *defendant*, and the court, being satisfied that the plaintiff's attorney had agreed to receive, and did receive and transmit to the plaintiff, notice of the time and place of taking such depositions, suffered the plaintiff to read them in evidence to the jury.

4. The fourth bill of exceptions was to the opinion of the court given to the jury at the request of the plaintiff, that if at the time the brig sailed from Tobago for Curraçoa the latter island was not a blockaded port by notification of the British government to the American nation, but was blockaded in fact, and if the master was ignorant of such blockade until he was warned off by the blockading force, and being so warned he did not again attempt to enter the blockaded port, but changed his course intending to come directly to Norfolk, and in the prosecution of such voyage to Norfolk was captured by a French cruiser, and recaptured by an English vessel, carried into Jamaica, libelled, condemned

and sold under a decree of the vice-admiralty court of that island, then such sailing from Tobago for Curraçoa, and from thence to Norfolk, was a lawful voyage within the meaning of the contract of insurance, and not within the exception in the policy, and the plaintiff was entitled to recover against the underwriters an indemnity for the loss sustained by such capture, recapture and sale.

Youngs, for the plaintiff in error, contended,

1. That blockaded ports were absolutely excepted from the policy, and, consequently, there was no insurance if the vessel sailed for a blockaded port. The exception amounts to a warranty that the vessel shall not sail for a blockaded port; and the insured | takes upon himself p. 339
the chance of the port being blockaded. *Park*, 322. 367. *Kenyon* v. *Berthow*.

2. That the copy of the proceedings of the court of vice-admiralty, at Jamaica, was not sufficiently authenticated to be admitted in evidence. The act of congress does not designate any mode of authentication of foreign papers, but has left that subject entirely to the state legislatures. As the court below was sitting at Alexandria, it ought to have been governed by the act of assembly of Virginia of December 8, 1792, (*Revised Code*, 168. *fol. ed.*) which requires, besides the attestation of a notary public, '*a testimonial* from the proper officer of the city, county, corporation, or borough where such notary public shall reside, or the *great seal* of such state, kingdom, province, island, colony, or place beyond sea.'

In the case of *Church* v. *Hubbart*, 2 *Cranch*, 238. this court said, that foreign judgments were to be authenticated, either by an exemplification under the great seal, or by a proved copy, or by the certificate of an officer authorized by law, which *certificate itself* must be *properly* authenticated. The *proper* authentication, under the laws of Virginia, is the *testimonial* mentioned in the act of assembly, or the *great seal* of the colony or island.

3. With regard to the depositions taken on behalf of the defendant, and which the plaintiff wished to use on the trial, they ought not to have been read for the plaintiff, because they had not been taken in such a manner as to authorize the defendant to use them against the plaintiff.

This court has determined that notice to an attorney at law is not such notice as is required by the act of assembly of Virginia, for taking depositions, and the attorney could not admit, or waive notice but upon record. |

E. J. Lee and *C. Lee*, contra, were stopped by the court as to the first p. 340
point.

2. As to the copy of the proceedings in the court of vice-admiralty, they took a distinction between the proceedings of municipal courts, and courts of the law of nations. The seals of courts of admiralty, in cases

under the law of nations, are admitted in evidence without further authentication, because they are courts of the whole civilized world, and every person interested is a party. 1 *Rob.* 296. *The Maria. Gilb. Law of Ev.* 22, 23. This was admitted by the counsel on both sides in the case of *Church* v. *Hubbart,* referred to by the opposite counsel.

Besides, these proceedings are authenticated in the manner provided by the 19th article of the British treaty of 1794.

Jones, in reply.

The exception in the policy was not intended merely to exclude the *risk* of attempting to enter a blockaded port, but excluded *all* risks if the vessel should sail for a port actually blockaded. The trade with a blockaded port is an illegal trade, and there is an express warranty at the foot of the policy against all losses arising from seizure for or on account of illicit or prohibited trade. The exception, therefore, must have been intended to provide for something else. Can it be contended that if the vessel had sailed for Hispaniola, the underwriters would have been liable for a loss, happening in any manner whatsoever? Yet blockaded ports and Hispaniola are equally excepted, and in the very same words. A voyage to such a port is as much excluded from the policy as a voyage to Hispaniola. The exclusion of particular ports amounts to a warranty that the vessel shall not sail to such ports; and if a warranty be not complied with, the underwriters are not bound, whatever may be the
p. 341 cause of the | non-compliance, and whether the loss happened in consequence of such non-compliance, or not. It is a condition precedent; and an innocent, an ignorant, or a compulsive violation of a warranty, however immaterial, avoids the contract of insurance. *Park,* 318. 326. 363. 369. *Marshall,* 348. 354.

March 13.

MARSHALL, Ch. J. delivered the opinion of the court as follows, viz.

The material question in this case grows out of an exception in a policy of insurance.

The plaintiff insured a specified sum on the brig Richard, belonging to the defendant, 'at and from Tobago to one or more ports in the West Indies, and at and from thence to Norfolk;' and the insurance is declared to be made against '*all risks,* blockaded ports and Hispaniola excepted.'

The Richard sailed from Tobago for Curraçoa, which was then blockaded in fact, but the blockade was not known at Tobago when the vessel sailed, nor was it known to the captain until he was warned off by a British ship of war. He then sailed for Norfolk; but on his voyage was captured by a French privateer, by whom the vessel was plundered to a considerable extent, and ordered to St. Domingo for trial.

The question is, whether this risk comes within the exception contained in the policy.

The counsel has considered the exception as a warranty; but the court cannot so consider it. The words are the words of the insurer, not of the insured; and they take a particular risk out of the policy which, but for the exception, would be comprehended in the contract. |

What is that risk? p. 342

Policies of insurance are generally the most informal instruments which are brought into courts of justice; and there are no instruments which are more liberally construed, in order to effect the real intention of the parties, if that intention can be clearly ascertained.

In that part of the policy on which the present controversy depends, a few words are given, to which others must be subjoined in order to complete the sense, and give a full description of the risk against which the underwriters are unwilling to insure. These words are, 'blockaded ports and Hispaniola excepted.'

It is reasonable to suppose that a voyage to Hispaniola was not insured. The assured has notice of this, and if he sails for Hispaniola, the voyage is entirely at his own risk. Against the risks of such a voyage, whatever they may be, the underwriters will not insure. It is a specified place, excluded, by consent, from the policy. The perils attending the voyage are understood, whether they arise from the sea, or otherwise, and are all excepted. The motives for making the exception do not appear, nor can they be inferred from the instrument.

The plaintiff in error contends that the same reasoning applies, in its full extent, to the exception of blockaded ports; but the court does not think so.

Hispaniola is excepted absolutely from the policy; but other ports are within the terms of the voyage insured, if they be not blockaded. It is their character, as blockaded ports, which excludes them from the insurance. Their being excepted by this character is thought to justify the opinion, that it is the risk attending this character which produces the exception, and which is the risk excepted. The risk of a blockaded port, as a blockaded port, is the risk incurred by breaking the blockade. This is defined | by public law. Sailing from Tobago for Curraçoa, knowing Curraçoa to be blockaded, would have incurred this risk, but sailing for p. 343 that port, without such knowledge, did not incur it.

The underwriter had no objection to a voyage to Curraçoa, other than might arise from its being blockaded. The dangers of the blockade, therefore, were the particular dangers which induced the exception, and it seems to the court that the exception ought not to be extended beyond them. If this be correct, the circuit court committed no error in refusing to give the opinion which was required by the counsel on this point.

The sentence in this case is sufficiently authenticated to be received as evidence. Being a court acting under the law of nations, its proceedings may be proved according to the mode observed in the present case; and were this doubtful, that doubt would be removed by the circumstance that it is the form stipulated by treaty.

The defendant is not at liberty to except to his own depositions, because he does not produce proof of his having given notice to the plaintiff. The admission of notice by the plaintiff is certainly sufficient, if notice to him was necessary, to enable him to use the defendant's deposition.

The fourth bill of exceptions depends on the principles stated by the court, in the first part of this opinion.

There is no error in the judgment of the circuit court, and it is *affirmed, with costs.*

The Maryland Insurance Company v. Woods.

(6 Cranch, 29) 1810.

In an action upon a policy on property warranted neutral, 'proof of which to be required in the United States only,' a sentence of condemnation in a foreign court of admiralty, upon the ground of breach of blockade, is not conclusive evidence of a violation of the warranty.

Quære, whether breach of blockade, by a vessel not warranted neutral, would discharge the underwriters?

If a vessel sail to a port within the policy, with intent to go to a port not within the policy, in case the former should be blockaded, this is not a deviation. A vessel might lawfully sail for a port in the West Indies, known to be blockaded, until she was warned off, according to the British orders of April, 1804. She was not bound to make inquiry elsewhere than of the blockading force.

ERROR to the circuit court for the district of Maryland, in an action of covenant, upon two policies of insurance, one upon the schooner William & Mary, Travers, master, and the other upon her cargo, 'from Baltimore to Laguira, with liberty of one other neighbouring port, and at and from them, or either of them, back to Baltimore.' The policy contained the following clause: 'Confessing ourselves paid the consideration due unto us for the assurance of the said assured, or his assigns, after the rate of seven and one half *per cent.* on cargo, by said vessel *warranted by the assured to be American property, and that the vessel is an American bottom, proof of which to be required in the United*
p. 30 *States only.* Insured against all risks, the | assured binding himself to do all in his power, in case of capture, for the defence of the property, and, if condemned, that he will enter an appeal if practicable.'

Upon the trial of the issue of *non infregit*, seven bills of exceptions were taken. The first was by *Woods*, the plaintiff below, in whose favour the judgment was rendered, and is, therefore, unimportant, excepting

that it states the facts which each party offered evidence to prove, and is referred to in all the other bills of exceptions.

It states, that the plaintiff gave evidence, that he was a citizen of the United States, and sole owner of the vessel and cargo, of the value insured, and made insurance thereupon, according to the policies. That the vessel arrived in safety off the port of Laguira, on the 29th of March, but was refused permission to enter the port, except upon terms, as to the sale of his cargo, which the master deemed too disadvantageous to be accepted. That he remained with his vessel off the port, endeavouring to obtain permission to enter it on more advantageous terms, until the 31st of March, when, finding that such permission could not be obtained, he sailed with the vessel and cargo *towards* the port of Amsterdam, in the island of Curraçoa, with a view and intention of ascertaining, by inquiring from British ships of war, or other ships, or by actual inspection, or other proper means, whether the said port was in a state of blockade, and of entering it, if he should find it not blockaded. That about four months before, he had been informed in Baltimore, that an American vessel, bound to that port, had been warned off by the British blockading force ; and a report, which he had heard in Baltimore before he sailed, that the island was still blockaded, induced him to suppose, at the time of sailing towards Amsterdam, that that port might still be in a state of blockade, (*he then being ignorant of that fact*, and *not having been able to obtain information relative thereto off Laguira*,) and to resolve to make | inquiry as aforesaid, before he attempted to enter the port. p. 31
That on the first of April, on his passage to Amsterdam, being then about 28 or 30 miles distant therefrom, he discovered a ship, distant about 21 miles, and immediately changed his course and stood towards her, for the purpose of inquiring whether Amsterdam was still blockaded. The ship was the British ship of war ' Fortune,' and was then supporting alone the blockade of the port of Amsterdam. While standing towards her, she seized and captured the schooner as prize, under pretence of an attempt to break the blockade, and sent her to Jamaica, where the vessel and cargo were condemned as good prize, whereby they were totally lost to the plaintiff. That the distance of Amsterdam from Laguira was about 147 miles, which may be run in fifteen or twenty hours. That the plaintiff, upon the first intelligence of the capture, offered to abandon, and demanded payment of the loss.

That the British minister, on the 12th of April, 1804, informed the government of the United States, that the siege of Curraçoa was converted into a blockade, which notification the government of the United States did not at any time make known. That the British government had issued an order to their commanders, and to their admiralty courts, in the West Indies, ' not to consider blockades as existing, unless in

respect to particular ports which may be actually invested, and then not to capture vessels bound to such ports, unless they shall have previously been warned not to enter them.' That this order was in force at the time of the capture, and had been notified by the British government to the government of the United States, and immediately published in the gazettes of the United States.

That to the eastward of Laguira, on the Spanish Main, the first port is *New Barcelona*, at the distance of about 57 leagues from *Laguira*.
p. 32 That it is a small port only entered by small vessels. That | the next port to the eastward of Laguira, on the Spanish Main, is *Cumana*, at about the distance of 70 leagues. That about the time of the voyage aforesaid, no vessel could enter the port of *New Barcelona* without having obtained permission therefor at *Cumana*. That the next port on the Spanish Main, from Laguira, westward, is *Porto Cabello*, under the same jurisdiction, and at the distance of about 18 leagues; that no vessel could enter that port without having obtained permission therefor at *Laguira*. That the next port on the Spanish Main, to the westward of *Laguira*, is *Maracaibo*, at the distance of about 93 leagues, and about two and a half degrees further west from the port of Amsterdam. That the usual course of trade for vessels from Baltimore with cargoes for *Laguira*, assorted for the Spanish Main, is to proceed to the port of *Amsterdam*, if refused permission to enter *Laguira*. That vessels in such cases *never* proceed to *Cumana* or *New Barcelona*. That except Amsterdam, and the said ports on the Spanish Main, the nearest port to *Laguira*, used for the purposes of trade, is in the island of *Porto Rico*, distant more than 120 leagues. But that *Carthagena*, on the Spanish Main, although more distant than *Porto Rico*, may be reached from *Laguira* in a shorter time, being more in the course of the winds. That there is no port in the island of *Bonaire*, except a small roadstead on the west side of the island, where there is a small battery and military post. That a vessel bound from Laguira to Amsterdam, could not touch at the said roadstead without going about five leagues out of her way, and being delayed three or four hours, and that there is no other place in the neighbourhood of Laguira or of Amsterdam, except *Porto Cabello*, where information could then have been had respecting the continuance of the blockade.

The *defendants* then offered evidence to the jury, that when Travers sailed from Baltimore, and when he arrived at Laguira, and when he sailed from thence and arrived near the island of Curraçoa, he had
p. 33 reason to believe, and *did know*, that that island | was actually blockaded and *attempted* to enter the port of Amsterdam. That when the insurance was effected, a vessel might enter Cumana and Porto Cabello without first obtaining permission elsewhere. That the Spanish government was

a party in the war. That it has been usual and customary for vessels sailing from Baltimore, having cargoes suitable to the markets on the Spanish Main, to proceed direct to either of the ports of Cumana, New Barcelona, Porto Cabello, Maracaibo, or Carthagena, without first calling at Laguira for permission.

Whereupon the *plaintiff* prayed the direction of the court to the jury, that if they believe the matters so offered in evidence *by him*, then the proceeding towards the port of Amsterdam for the purposes and in the manner so by the *plaintiff* stated and offered in evidence, doth not in operation of law deprive him of his right to recover for the said losses under the said policies.

But the court were of opinion, and so directed the jury, that if they shall be satisfied from the evidence in the case, that Travers, the master of the schooner, had reason to believe that the island of Curraçoa was actually blockaded at the time when he sailed from Laguira, and when he arrived near the said island, and that he attempted to enter the port of Amsterdam, then the plaintiff cannot maintain the present action.

To which opinion the plaintiff excepted.

The 2d bill of exceptions stated that the defendants, in addition to the evidence by them offered as stated in the first bill of exceptions, gave in evidence that Captain Travers might have obtained information at Laguira of the blockade of Curraçoa, (it being well and generally known there,) if he had made the inquiry ; but that he made no such inquiry.

That there is a small island to the eastward of | Curraçoa, called *Bonaire*, p. 34 and about 20 miles distant therefrom on the direct and usual route to Curraçoa, and where Captain Travers might also have received information of the blockade, but he sailed past the island without stopping thereat, or taking any measures whatever to learn whether the blockade existed or not. That after Travers found he could not sell his cargo to advantage at Laguira, he *determined* to proceed to *Porto Rico*, and as Curraçoa was very little out of the course, to ascertain whether the blockade still continued. That on the 12th of April, 1804, the blockade of Curraçoa was notified by the British minister to our government, and that there had been no notification of a discontinuance thereof. That when the schooner left Baltimore, it was generally *reported and understood*, that Curraçoa was blockaded. They also offered in evidence the record and proceedings of the admiralty court at Jamaica, and that the schooner was condemned on the ground of an *attempt* to violate the blockade.

Whereupon the PLAINTIFF offered in evidence all the matters by him offered in evidence as stated in the first bill of exceptions, which bill of exceptions is referred and made part of this bill of exceptions, and also offered in evidence that the matters by the defendants stated in

this and the foregoing bill of exceptions are untrue; and also that Travers, while lying off Laguira, did inquire whether the blockade of Curraçoa still continued, and could obtain no information on that subject; and also that at the time he discovered the ship of war, he might have proceeded to, and entered into, the port of Amsterdam without being intercepted by the frigate.

Upon which aforesaid statement of facts, so given in evidence, the *defendants* pray the court to instruct the jury that the said Travers was not justified in sailing from Laguira and passing the island of Bonaire without inquiring there whether the port of Amsterdam was blockaded, and that in consequence thereof, the plaintiff is not entitled to recover. |

p. 35 *But the court were of opinion*, that if the jury shall be satisfied, from the evidence in the case, that Travers sailed from Laguira for Amsterdam, with intent to enter that port if not actually blockaded, but if blockaded not to attempt to enter, but to sail for the island of St. Thomas; and if the jury shall be satisfied, from the evidence, that Travers did not attempt to enter the said port, but was captured on his way thither, at the distance of 29 or 30 miles therefrom, the court directed the jury that such conduct of Travers was not unlawful, and that, notwithstanding such conduct, the plaintiff can maintain the present action.

The 3d bill of exceptions stated that the defendants, upon all the matters in the preceding bills of exceptions contained, prayed the court to instruct the jury that if they believe that the blockade was notified by the British government to the American government, in a reasonable time before Travers sailed, and that it was generally known in Baltimore before he sailed, and that he had been informed of it, and knew of the general report and belief, and under these circumstances sailed from Laguira to the port of Amsterdam, without making due inquiry at Laguira, whether the blockade subsisted at Amsterdam, and passed Bonaire without making such inquiry, to the place where he was captured, then he was not justifiable in proceeding on the said voyage to Curraçoa, there to make inquiry, not having first made the inquiry in the neighbouring ports of Laguira and Bonaire.

The court refused to give the instruction as prayed, but repeated the instruction stated in the second bill of exceptions; to which the defendants excepted.

The 4th bill of exceptions stated that the defendants prayed the court to direct the jury, that if they shall be of opinion that there are three ports on the Spanish Main, viz. Port Cabello, at the distance of

p. 36 21 leagues from Laguira, Maracaibo at 93 leagues | from Laguira, and about 2 1-2 degrees further west than Amsterdam, and Carthagena at the distance of 185 leagues from Laguira to the westward, and that

the prevailing winds there are generally from the eastward, and that a voyage may be performed with more facility from Laguira to Porto Cabello than to Curraçoa, and from Laguira to Maracaibo and Carthagena, than to the island of St. Thomas, or Porto Rico. That those ports are situated on the Spanish Main, and under the government and jurisdiction of the King of Spain. That vessels sailing from the ports of the United States, are in the habit of sailing direct to the said ports of Porto Cabello, Maracaibo, and Carthagena without obtaining permission from the government at Laguira. That vessels leaving the United States with cargoes suited to the market on the Spanish Main, frequently sailed from Laguira, to one or other of the above-mentioned ports for the disposal of their cargoes. That the island of Curraçoa belongs to the Dutch government, who were parties to the war. That there are two other ports on the Spanish Main, under the Spanish government, lying to windward of Laguira, viz. Cumana, 70 leagues, and New-Barcelona, 57 leagues from Laguira, but the voyage from Laguira to those ports is more difficult than the voyage to Curraçoa, which is 147 miles. That Curraçoa was known to be blockaded, and so notified by the British government to that of the United States a reasonable time before Travers sailed, and that he knew the same at the commencement of the voyage; then Amsterdam was not a port to which he was entitled to go under the said policy. Which direction the court refused to give. And the defendants excepted.

The 5th exception stated that the *defendants* prayed the opinion of the court, upon the whole facts before stated, whether the insured had a right to proceed to Porto Rico, or St. Thomas, under the terms of the policy. That the court directed the jury that he had *no* such right, and that the *defendants excepted.* |

The 6th exception stated that the defendants, upon all the matters p. 37
aforesaid, prayed the court to instruct the jury that if they believe that the insured, after his arrival at Laguira, proceeded on a provisional voyage for the port of Amsterdam, or for Porto Rico, or for St. Thomas, with an intention to go to Amsterdam, if not blockaded, and to Porto Rico, or St. Thomas, if the port of Amsterdam was blockaded, he was not so entitled to do under the policies, and in consequence thereof, that the plaintiff is not entitled to recover. Which direction the court refused to give, but gave the following opinion.

The court having declared that the said Travers had a right to proceed from Laguira to Amsterdam, as is fully stated in their second opinion, to which they refer, they directed the jury that if they find that the said Travers intended, if the port of Amsterdam was | blockaded, p. 38
to go to the island of Porto Rico, or St. Thomas, that such his *intention only* will not affect the policies; and that notwithstanding such inten-

tion the plaintiff can maintain his action thereon. To which direction the defendants excepted.

The 7th bill of exceptions stated that the defendants upon all the matters in the preceding bills of exception stated, prayed the opinion of the court that if the jury believe that Travers sailed from Laguira, *on a voyage to St. Thomas, or* Porto Rico, but with an intention to proceed a small distance out of the way to see if Amsterdam was blockaded, and in case it was not blockaded then to enter that port, and did so proceed to the port of Amsterdam, and was captured as aforesaid, then the defendants are not answerable; which opinion and direction the court refused to give, but gave the following opinion.

The court having declared that the said Travers had a right to proceed from Laguira to Amsterdam, as is fully stated in their second opinion, to which they refer, they are of opinion, and accordingly directed the jury, that if they find that the said Travers intended, if the port of Amsterdam was blockaded, to go to the island of Porto Rico, or the island of St. Thomas, such his intention only will not affect the policies aforesaid, and that notwithstanding such intention, the plaintiff can maintain his actions on the said two policies. To which instruction the defendants excepted.

The verdict and judgment being in favour of the plaintiff, the defendants brought their writ of error.

P. B. Key, for the plaintiffs in error, contended,

1. That the court ought not to have permitted parol evidence to be given of the intention of Captain Travers to break the blockade, because the sentence of condemnation was conclusive evidence of that attempt. Curraçoa was not a port within the policy, because the policy did not give leave to sail to a blockaded port.

2. A *neighbouring* port, means a port on the Spanish Main, under the same government as Laguira.

St. Thomas was not a neighbouring port; if it was, he deviated in going to Curraçoa.

He sailed for Curraçoa with a knowledge that it was blockaded, and therefore the defendants are discharged.

Harper, contra.

The evidence is conflicting as to the knowledge of the captain of the blockade, and therefore upon that point this court can give no opinion. The only evidence of such knowledge is, that there was a blockade at a prior period, which had been notified to our government. But there is a difference between a blockade by notification, and a blockade *de facto*. A vessel has a right to go and inquire of the blockading force. The British government had declared that no blockades should be con-
p. 39 sidered as existing | in the West Indies, except blockades *de facto*, and

then not to capture them unless they should have been previously warned off. Under this order and declaration of the British government, Travers had a right to go and see whether the port was or was not actually blockaded. This court will not extend the principle of blockade farther than it has been extended by the British government.

The voyage, then, to Curraçoa, was lawful. Travers was in the due course of the voyage, and it was altogether immaterial whether he had any or what other port eventually in view.

Martin, in reply.

Travers had no right to sail for Curraçoa, knowing it to be blockaded. If there be in fact a blockade, no vessel knowing that fact has a right to go to the blockaded port for inquiry. If she does, she is not, by the law of nations, entitled to warning, but is good prize at once. *Ille hostis est qui dat auxilium hostibus.* If she sails to a blockaded port, knowing it to be blockaded, she assumes the hostile character, and is to be treated in all respects like an enemy. This was a blockade by notification as well as *de facto*. Our government had express notice, and all our citizens are to be presumed to have notice also.

The British treaty is not in force, but it is a correct exposition of the law of nations on the subject of blockade. *Fitzsimmons* v. *Newport Ins. Co.* 4 *Cranch*, 199.

The sentence is conclusive evidence of the *breach of blockade*, notwithstanding the clause in the policy that proof of the property being American is to be made here only. We admit the property was American —we admit every thing that is to be proved under that clause. But it was not agreed that the question of *breach of blockade* should be tried here only. If the clause is to be so construed, it would place the insurance companies entirely in the power | of the insured, because all the p. 40
persons on board are the agents of the assured, and interested to justify their own conduct.

It is the duty of the insured and his agents to do nothing to increase the risk, and to do all in his power to avoid loss; and their negligence, or improper conduct will discharge the underwriters. Thus in the case of the *ship Atlantic*, *Marshall*, 321. want of a passport at first sailing, although obtained before capture, and although the capture was not for want of that paper, yet the underwriters were discharged. The insured is answerable for all the improper conduct of the master if it do not amount to barratry.

Travers knew that Curraçoa was blockaded; at least he had the strongest grounds of believing it; and if he was not certain, he ought to have inquired at Laguira, or at *Bonaire*. This neglect increased the risk and discharged the underwriters.

Curraçoa was not a neighbouring port within the meaning of the

policy. It means only a port on the Spanish Main. General expressions may be restrained by the nature of the case. Thus, in the case of *Hogg* v. *Horner*, 2 *Marshall*, 397. the expression in a policy on a voyage from Lisbon to London, 'with liberty to touch at any port in Portugal,' was construed to mean any port to the northward of Lisbon only.

The fifth exception was taken to the opinion of the court, to show a repugnance between that and the opinion stated in the second bill of exceptions; for if it was unlawful to go to Porto Rico and St. Thomas, it was equally so to go to Curraçoa.

As to the sixth exception to the opinion that the intention to go to St. Thomas in case Curraçoa should be blockaded did not vitiate the policy.

p. 41 There must, at the commencement of the voyage | from Laguira, be a *certain fixed terminus ad quem.* Otherwise the door would be open to fraud upon the underwriters, as there could be no deviation. It ought to have been entered in the log-book to what port they were bound.

Neutral property may be condemned for violation of blockade. 1 *Rob.* 144. *Ship Neptunus.* We admit the property to be American, and neutral, but this American neutral vessel attempted to break the blockade.

A *notified* blockade is presumed *prima facie* to continue until the contrary be notified, or the blockade be removed *de facto.* 2 *Rob.* 92, 93. 106. 108. 1 *Marsh.* 65. 1 *Rob.* 131. The Columbia. This vessel, having knowledge of the blockade, was not entitled to the privilege of being warned off.

As to the right to go to Curraçoa to inquire, he cited 1 *Rob.* 280.

Harper, contra.

The case cited of the voyage from Lisbon to London, was a mere question as to the meaning of the parties. The nature of the voyage was called in aid of the construction, and it was decided to mean any port in the course of the voyage.

The clause as to proof of the neutrality of the property applies to its neutral character throughout the whole voyage.

Travers had a right to proceed towards the blockaded port for inquiry, even upon British principles, prior to the order of 1804. But after that order there can be no doubt.

Although there are *dicta* that a vessel sailing for a blockaded port knowingly is liable to be condemned, yet in no case is it the direct and

p. 42 sole ground of condemnation. In the case of the Columbia, | the vessel was taken in the actual attempt to break the blockade. But this doctrine is overruled by the court of errors and appeals in New-York.

1 *Caines' Cases in Error*, 8. 1 *Caines' N. Y. Term Rep.* 12. 1 *Johns.* 256. *Schmidt* v. *N. Y. Insurance Company.*

In 1 *Rob.* 280, 281. *The Betsy*, the limitations of the rule as to sailing for a blockaded port knowingly are stated by Sir William Scott. The distance of the place from whence the vessel sails may excuse. So may also the nature of the blockade. In the West Indies the blockades were so short and uncertain as to form an exception to the general rule. 2 *Rob.* 95. *The Neptunus.* But the British order of 1804 is decisive.

Martin, in reply.

The British order will not bear that construction. It has never received that construction in their courts. If it had this vessel would not have been condemned.

Nothing but the neutrality of the property is to be proved in this country; not that the vessel did not conduct herself as a neutral.

The case of Fitzsimmons *v.* The Newport Insurance Company, was a case of naked *intention*, without an *act* in pursuance of such intention. *Sailing* with that intention *is an act.*

February 16.

MARSHALL, Ch. J. delivered the following opinion of the court, viz.

This cause comes on upon various exceptions to opinions delivered by the circuit court of Maryland.

The first exception, having been taken by the party | who prevailed p. 43
in the cause, is passed over without consideration.

The 2d and 3d exceptions are so intimately connected with each other, that they can scarcely be discussed separately.

This action was brought by the owners of the cargo of the William & Mary, to recover from the Maryland Insurance Company the amount of the policy insuring the cargo of that vessel. The voyage insured was 'from Baltimore to Laguira, with liberty of one other neighbouring port, and at, and from them, or either of them, back to Baltimore.' The cargo was warranted to be American property, and the vessel to be an American bottom, 'proof of which was agreed to be required in the United States only.'

Previous to the sailing of the William & Mary from Baltimore, the blockade of Curraçoa had been notified to the President of the United States, by the British government, and was generally known in Baltimore. The vessel arrived at Laguira, from which place she sailed for some other port, was captured within thirty miles of the port of Amsterdam, in Curraçoa, then actually blockaded, and was condemned for an attempt to break the blockade.

The proof whether the William & Mary sailed from Laguira for Curraçoa, or for St. Thomas's or Porto Rico, is not positive; and the

evidence respecting the information which she sought, or might have received, at Laguira, respecting the blockade of Curraçoa, is contradictory. On the part of the plaintiff below, evidence was given that, at Laguira, information of this fact was sought and could not be obtained. On the part of the underwriters, evidence was given, that no inquiry respecting it was made at Laguira, and further, that there was a small island called Bonaire, between Laguira and Curraçoa, not much out of
p. 44 the track from the former place | to the port of Amsterdam, at which no inquiry respecting the blockade of Amsterdam was made.

The counsel for the underwriters prayed the court to instruct the jury, that, if they believed these facts, the plaintiff could not recover.

This instruction the court refused to give, but did instruct the jury ' that if they shall be satisfied, in this case, that Captain Henry Travers, master of the said schooner, sailed from Laguira for the port of Amsterdam, in the island of Curraçoa, with intent to enter the said port, if not actually blockaded, but, if blockaded, not to attempt to enter, but to sail for the island of St. Thomas's, and if the jury should be also satisfied, from the said evidence, that the said Henry Travers did not attempt to enter the said port, but was captured on his way to the said port, at the distance of 29 or 30 miles therefrom, the court are of opinion, and accordingly directed the jury, that such conduct, on the part of the said Henry Travers, was not unlawful, and that, notwithstanding such conduct, the plaintiff can maintain the present action.'

This opinion and direction of the circuit court asserts two principles of law.

1. That the sentence and condemnation of a foreign court of admiralty, condemning a vessel as prize for attempting to enter a blockaded port, is not conclusive evidence of that fact, in an action on this policy.

2. That, under the circumstances of the case, the sailing from Laguira, and the passing Bonaire, without making any inquiry, at either place, respecting the blockade of Amsterdam, were not such acts of culpable negligence as to discharge the underwriters.

1. Is the sentence of a foreign court of admiralty, in this case, conclusive evidence of the fact it asserts ? |
p. 45 This depends entirely on the construction given to the policy. The question respecting the conclusiveness of a foreign sentence was, some time past, much agitated throughout the United States, and was finally decided, in this court, in the affirmative. Pending this controversy, a change was introduced in the form of the policy, at several offices, by inserting, after the warranty that the property was neutral, the words, ' proof of which to be required in the United States only.'

By the underwriters it is contended that these words go to the

property only, and not to the conduct of the vessel. By the assured it is contended that they apply to both.

The underwriters insist that the words themselves import no more than that proof respecting the property may be received in the United States, and that a more extended construction is not necessarily to be given to them in consequence of their connection with the warranty of neutrality, because a neutral vessel attempting to enter a blockaded port would thereby discharge the underwriters, although no warranty of neutrality should be found in the policy.

There is much force in this argument, and if the question shall ever occur on such a policy, it will deserve serious consideration. But whatever might be the law in such a case, the majority of the court is of opinion that, under this policy, the sentence of the foreign court of admiralty is not conclusive.

The contract of insurance is certainly very loosely drawn, and a settled construction, different from the natural import of the words, is given, by the commercial world, to many of its stipulations, which construction has been sanctioned by the decisions of courts. One of these is on the warranty that the vessel is neutral property. It is not improbable that, without such warranty, the attempt of a neutral | vessel p. 46
to enter a blockaded port might be considered as discharging the underwriters. But no such decision appears ever to have been made; nor is the principle asserted, so far as is known to the court, in any of the numerous treatises which have been written on the subject. On the contrary, the judgments rendered in favour of the underwriters, in such cases, have been uniformly founded on the breach of the warranty of neutrality, which, though in terms extended only to the property, has been carried, by construction, to the conduct of the vessel. It is universally declared that anti-neutral conduct forfeits the warranty that the vessel is neutral.

This being the construction put by the parties, and, in consequence thereof, by courts, on the warranty of neutrality, it is fair to consider the reservation of the right of giving proof in the United States, which, in direct terms, refers to the whole warranty, as intended by the parties to be co-extensive with the warranty itself; and, as the conduct of the vessel was, in legal construction, comprehended in the warranty of her neutrality, that the conduct of the vessel would, in legal construction, be comprehended in the reservation of a right to make proof in the United States.

The majority of the court, therefore, is of opinion, that the circuit court did not err in submitting the testimony respecting the conduct of the vessel, in this case, to the jury.

2. Are the underwriters discharged by the conduct of the captain?

This question is susceptible of several subdivisions.

1. Was the port of Amsterdam, in Curraçoa, a neighbouring port, within the policy ?

2. Did the intention to pass Amsterdam, if blockaded, discharge the underwriters ? |

p. 47 3. Was an omission to inquire at Laguira or Bonaire, respecting the blockade of Amsterdam, such a culpable negligence as to discharge the underwriters ?

It is the opinion of the court that the port of Amsterdam was a neighbouring port within the policy. The distance between the two places is inconsiderable. It is not stipulated that the neighbouring port shall be one under the Spanish government, nor is it to be implied from the nature of the case. Indeed, the common usage of Baltimore, which was given in evidence, for vessels sailing with cargoes assorted for the Spanish Main to and from Laguira to Curraçoa, if refused admittance into the former port, would be conclusive on this point, if, in other respects, it could be doubtful.

Neither was the intention to sail for some other port, on the contingency of finding Amsterdam blockaded, a deviation.

It is admitted that the voyage from Laguira must be certain, and that only a certain voyage would be within the policy. But the opinion of the circuit court was founded on the jury's believing that the voyage from Laguira was for Amsterdam, a voyage which the vessel had a right to make, and that the intention to sail to another port, should Amsterdam be blockaded, constituted no deviation while on the voyage to Amsterdam.

Certainly an intention, not executed, will not deprive the insured of the benefit of his contract in a case in which he would not have been deprived of it, had he executed his intention. Had Captain Travers, on the voyage to Amsterdam, sustained a partial loss, and, after entering that port, determined to go to Porto Rico, or St. Thomas's, it is certain that, after sailing from Amsterdam, the voyage would have been no longer within the policy, nor would the underwriters have been answerable for a subsequent loss. But it could never be contended, with any |

p. 48 semblance of reason, that this discharged them from the loss sustained on the voyage to Amsterdam.

3. The omission of the captain to make any inquiry respecting the blockade of Amsterdam, at Laguira, or to call, for that purpose, at Bonaire, comes next to be considered.

The notoriety of the blockade of Curraçoa, before Captain Travers sailed from Baltimore, must affect him, especially as the instruction given to the jury is not made dependent on their believing that he had no actual knowledge of the fact. It seems a reasonable duty, in ordinary

cases, to make inquiry in the neighbourhood, if information be attainable, respecting the continuance of a blockade known previously to exist.

It is true, that upon this point, contradictory evidence was given; but the opinion of the court is predicated on the jury's believing that Captain Travers made no inquiry at Laguira. The correctness of that opinion, therefore, depends on its having been the duty of the captain to make this inquiry.

In an ordinary blockade, this, perhaps, might have been necessary; but it is contended, that blockades in the West Indies were so qualified by the British government, as to have dispensed with this necessity.

It was proved, that orders had been given by that government, to its cruisers and courts of vice-admiralty, which orders were communicated to, and published by, the government of the United States, 'Not to consider blockades as existing, unless in respect to particular ports which may be actually invested, and then not to capture vessels bound to such ports, unless they shall have been previously warned not to enter them.'

On the motives for this order, on the policy which | dictated this p. 49
mitigation of the general rule, so far as respected blockades in the West Indies, this court does not possess information which would enable it to make any decision, but it appears essentially to vary the duty of the masters of neutral vessels sailing towards a port supposed to be blockaded.

The words of the order are not satisfied by any previous notice which the vessel may have obtained, otherwise than by her being warned off. This is a technical term which is well understood. It is not satisfied by notice received in any other manner. The effect of this order is, that a vessel cannot be placed in the situation of one having a notice of the blockade until she is warned off. It gives her a right to inquire of the blockading squadron, if she shall not previously receive this warning from one capable of giving it, and, consequently, dispenses with her making that inquiry elsewhere. While this order was in force, a neutral vessel might lawfully sail for a blockaded port, knowing it to be blockaded, and being found sailing towards such port, would not constitute an attempt to break the blockade, until she should be warned off.

There is, then, no error in the opinions to which the second and third exceptions are taken.

The 4th exception is taken to the refusal of the court to give an opinion to the jury, that, under the circumstances stated by the defendants below, the port of Curraçoa was not a neighbouring port within the policy.

The merits of this opinion have been essentially discussed in the view taken of the second and third exceptions, and need not be repeated.

The port of Curraçoa is considered as a port within the policy, and, consequently, the circuit court ought not to have given the opinion prayed for by the plaintiffs in error. |

p. 50 The 5th exception presents the extraordinary case of an exception to an opinion in favour of the party taking it, and, consequently, need not be examined.

The 6th exception presents a case not essentially varying from the second and third, and will therefore be passed over without other observation than that it is decided in the opinion on those exceptions.

The 7th exception is to a different point. The counsel for the defendants below prayed the court to instruct the jury, 'that if they believed the said Travers sailed from Laguira on a voyage to St. Thomas's, or Porto Rico, but with an intention to proceed a small distance out of the way to see if Amsterdam was blockaded, and in case it was not blockaded, then to enter that port, and did so proceed to the port of Amsterdam, and was captured as aforesaid, then the defendants are not answerable.'

This opinion the court refused to give, and proceeded to repeat the instruction to which the second and third exceptions were taken.

If St. Thomas's, or Porto Rico, were not neighbouring ports within the policy, as is most probably the fact, then the voyage from Laguira to either of those places was not insured. If they were neighbouring ports, so that a voyage to either of them was within the policy, then going out of the way to see whether Amsterdam was blockaded was a deviation, and, of consequence, the underwriters are equally discharged.

The only doubt ever felt on this point, was, whether any testimony had been offered to the jury to establish this fact, which would authorize counsel to request the opinion of the court respecting the law. On examining the record, it appears that such testimony was offered. It is stated that the defendants below offered in evidence, that the captain, on finding he could not be permitted to dispose of his cargo at Laguira, but on terms which amounted to a total sacrifice of it, 'determined to
p. 51 proceed to Porto | Rico, and, as Curraçoa was very little out of the course, to ascertain whether the blockade still continued.'

This evidence might be disbelieved by the jury, but the defendants were certainly entitled to the opinion of the court declaring its legal operation if believed.

It is the opinion of the court, that, in refusing to give the opinion prayed in the seventh exception, the circuit court erred, for which their judgment is reversed, and the cause remanded for a new trial.

The Schooner Exchange v. M'Faddon and others.

(7 Cranch, 116) 1812.

A public vessel of war of a foreign sovereign at peace with the United States, coming into our ports, and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country.

February 24th.

Present . . . All the judges.

THIS being a cause in which the sovereign right claimed by NAPOLEON, the reigning emperor of the French, and the political relations between the United States and France, were involved, it was, upon the suggestion of the Attorney General, ordered to a hearing in preference to other causes which stood before it on the docket. |

It was an appeal from the sentence of the Circuit Court of the United p. 117
States, for the district of Pennsylvania, which reversed the sentence of the District Court, and ordered the vessel to be restored to the libellants.

The case was this—on the 24th of August, 1811, *John M'Faddon & William Greetham*, of the State of Maryland, filed their libel in the District Court of the United States, for the District of Pennsylvania, against the *Schooner Exchange*, setting forth that they were her sole owners, on the 27th of October, 1809, when she sailed from Baltimore, bound to St. Sebastians, in Spain. That while lawfully and peaceably pursuing her voyage, she was on the 30th of December, 1810, violently and forcibly taken by certain persons, acting under the decrees and orders of NAPOLEON, *Emperor of the French*, out of the custody of the libellants, and of their captain and agent, and was disposed of by those persons, or some of them, in violation of the rights of the libellants, and of the law of nations in that behalf. That she had been brought into the port of Philadelphia, and was then in the jurisdiction of that court, in possession of a certain *Dennis M. Begon*, her reputed captain or master. That no sentence or decree of condemnation had been pronounced against her, by any court of competent jurisdiction; but that the property of the libellants in her, remained unchanged and in full force. They therefore prayed the usual process of the court, to attach the vessel, and that she might be restored to them.

Upon this libel the usual process was issued, returnable on the 30th of August, 1811, which was executed and returned accordingly, but no person appeared to claim the vessel in opposition to the libellants. On the 6th of September, the usual proclamation was made for all persons to appear and show cause why the vessel should not be restored to her former owners, but no person appeared.

On the 13th of September, a like proclamation was made, but no appearance was entered.

p. 118 On the 20th of September, *Mr. Dallas*, the Attorney | of the United States, for the District of Pennsylvania, appeared, and (at the instance of the executive department of the government of the United States, as it is understood,) filed a *suggestion*, to the following effect:

Protesting that he does not know, and does not admit the truth of the allegations contained in the libel, he suggests and gives the court to understand and be informed,

That in as much as there exists between the United States of America and Napoleon, emperor of France and king of Italy, &c. &c. a state of peace and amity; the public vessels of his said Imperial and Royal Majesty, conforming to the law of nations, and laws of the said United States, may freely enter the ports and harbors of the said United States, and at pleasure depart therefrom without seizure, arrest, detention or molestation. That a certain public vessel described, and known as the *Balaou*, or vessel, No. 5, belonging to his said Imperial and Royal Majesty, and actually employed in his service, under the command of the *Sieur Begon*, upon a voyage from Europe to the Indies, having encountered great stress of weather upon the high seas, was compelled to enter the port of Philadelphia, for refreshment and repairs, about the 22d of July, 1811. That having entered the said port from necessity, and not voluntarily; having procured the requisite refreshments and repairs, and having conformed in all things to the law of nations and the laws of the United States, was about to depart from the said port of Philadelphia, and to resume her voyage in the service of his said Imperial and Royal Majesty, when on the 24th of August, 1811, she was seized, arrested, and detained in pursuance of the process of attachment issued upon the prayer of the libellants. That the said public vessel had not, at any time, been violently and forcibly taken or captured from the libellants, their captain and agent on the high seas, as prize of war, or otherwise; but that if the said public vessel, belonging to his said Imperial and Royal Majesty as aforesaid, ever was a vessel navigating under the flag of the United States, and possessed by the libellants, citizens thereof, as in their libel is alleged,

p. 119 (which nevertheless, | the said Attorney does not admit) the property of the libellants, in the said vessel was seized and divested, and the same became vested in his Imperial and Royal Majesty, within a port of his empire, or of a country occupied by his arms, out of the jurisdiction of the United States, and of any particular state of the United States, according to the decrees and laws of France, in such case provided. And the said Attorney submitting, whether, in consideration of the premises, the court will take cognizance of the cause, respectfully prays that the court will be pleased to order and decree, that the process of attachment, heretofore issued, be quashed; that the libel be dismissed with

costs; and that the said public vessel, her tackle, &c. belonging to his said Imperial and Royal Majesty, be released, &c. And the said Attorney brings here into court, the original *commission* of the said *Sieur Begon*, &c.

On the 27th of September, 1811, the libellants filed their answer to the suggestion of the District Attorney, to which they except, because it does not appear to be made for, or on behalf, or at the instance of the United States, or any other body politic or person.

They aver, that the schooner is not a public vessel, belonging to his Imperial and Royal Majesty, but is the private property of the libellants. They deny that she was compelled by stress of weather, to enter the port of Philadelphia, or that she came otherwise than voluntarily; and that the property of the libellants in the vessel never was divested, or vested in his Imperial and Royal Majesty, within a port of his empire, or of a country occupied by his arms.

The District Attorney, produced the affidavits of the *Sieur Begon*, and the French consul, verifying the commission of the captain, and stating the fact, that the public vessels of the Emperor of France never carry with them any other document or evidence that they belong to him, than his flag, the commission, and the possession of his officers.

In the commission it was stated, that the vessel was *armed* at *Bayonne*.

On the 4th of October, 1811, the District Judge dismissed | the libel p. 120
with costs, upon the ground, that a public armed vessel of a foreign sovereign, in amity with our government, is not subject to the ordinary judicial tribunals of the country, so far as regards the question of title, by which such sovereign claims to hold the vessel.

From this sentence, the libellants appealed to the Circuit Court, where it was reversed, on the 28th of October, 1811.

From this sentence of reversal, the District Attorney, appealed to this Court.

DALLAS, *Attorney of the United States, for the district of Pennsylvania*, contended,

1. That this is not a case of admiralty and maritime jurisdiction.

2. That the public character of the vessel is sufficiently proved; and

3. That being a public national vessel of France, she is not liable to the ordinary judicial process of this country.

1. It ought to appear upon the proceedings themselves that this is a case of admiralty and maritime jurisdiction.

In England the jurisdiction of the Court of admiralty comprehends three branches. 1. The *criminal* jurisdiction, for the punishment of offences committed upon the high seas, or submitted to its cognizance by the statute *law*.

2. The *prize* jurisdiction, as to captures as prize of war, on the high seas. 3. The Instance Court, which has jurisdiction of *torts* committed

at sea, in which case locality is essential; and of *maritime contracts*, which are also perhaps local.

The district Courts of the United States, have the same three branches
p. 121 of jurisdiction, but the jurisdiction | must be shewn in the proceedings, together with the authority to seize within our waters. *Laws United States, Vol.* 1. *p.* 53, *sect.* 9. 11. *Vol.* 3. *p.* 91. *sect.* 6. 3. *Dall.* 6.

But the libel does not bring the case within either of those branches of jurisdiction. The libel simply states that while she was lawfully and peaceably pursuing her voyage, she was forcibly seized under the decrees of Napoleon, emperor of the French. It does not allege any crime upon the high seas. It does not state the seizure to be as *prize of war*. It does not allege a tort committed upon the high seas, nor any maritime contract. The admiralty has no jurisdiction upon the mere possession of the vessel in our harbors, unconnected with a *tort on the high seas*. Nor upon a tort committed here, or in a foreign country—nor upon a mere question of title. 2. *Browne, civ. and ad. law* 110, 111, 113, 114, 115, 116, 117.

There is not a single instance of admiralty jurisdiction exercised in this country without *possession*, coupled with a maritime tort.

2. As to the proof of the public character of the vessel. The flag, the public commission, and the possession of the officer, have always been sufficient evidence, at sea or in port—and for fiscal or executive purposes. Why should it not be sufficient evidence in a judicial proceeding? No public vessel ever carries any other documents. No other proof of property in the sovereign is ever required. It is acknowledged in all our treaties. Even the common law requires only the best evidence which the nature of the case admits.

In the case of *Mr. Pichon*, 4. *Dall.* 321. no other evidence of his public character was produced or required, than a letter from Talleyrand, the French minister for foreign affairs. Upon that evidence he was discharged.

HARPER, *for the Appellees.*

Admitted that the commission, the flag, and the possession, were sufficient evidence of the public character of the vessel. |

p. 122 DALLAS—The principal question then is, whether a public national vessel of France, coming into the United States to repair, is liable to be arrested upon the claim of title by an individual?

This vessel was seized by a sovereign, in virtue of his sovereign prerogative. In such a case, the claim of the individual merges in the right of the offended sovereign. The size of the vessel can make no difference. Upon principle, the Royal George, belonging to his Britannic majesty is as liable to this process, as the *Balaou* No. 5. Suppose a British frigate lying at New York, and one of her seamen should escape and libel her for his wages—the same argument which will support this case would support that.

This was one of the seizures under the Rambouillet decree. We do

not justify that decree, but we say that whenever the act is done by a sovereign in his sovereign character, it becomes a matter of negotiation, or of reprisals, or of war, according to its importance.

It is proved that she arrived in distress—that she had been sent on a distant mission with a military cargo. No assent to submit to the ordinary jurisdiction of the country, can be presumed in such a case as that. She had committed no offence while here. She did not come to trade. There was no implied waver of the peculiar immunities of a public vessel. The right of free passage was open to her, as it was to the public vessels of every other nation, except England, whose ships were expressly excluded by a particular statute.

But put the question *generally*, can a vessel of war, for any cause, be attached at the suit of an individual. In doubtful cases the argument *ab inconvenienti*, ought to have great weight. The jurisdiction now claimed would extend to *all men*, to *all suits*, to torts and to contracts ; to every vessel seized in a foreign port and taken into the public service. Impressed seamen might libel a whole British squadron for their wages. The peace of our ports and harbors would be at the mercy of individuals. It would be impossible to carry it into practice. The sentence of the Court could not be executed. It is beautiful in theory to exclaim '*fiat* | *Justitia* p. 123 *—ruat cœlum*,' but justice is to be administered with a due regard to the law of nations, and to the rights of other sovereigns. When an individual receives an injury from a foreign sovereign, he must complain to his own government, who will make it a matter of negotiation, and if justice be refused may grant reprisals.

Our acts of Congress never subject foreign public vessels to forfeiture. The *non-intercourse* act (as it is called) forfeits private, but not public British vessels—the public vessels are forbidden to come, if they do come, you order them to depart. If they refuse and you are not strong enough to drive them away, you prohibit supplies to them ; but you do not subject them to forfeiture.

We do not, however, deny the right of a nation to change the public law as to foreign nations, upon giving notice. We may forbid the entrance of their public ships, and punish the breach of this prohibition by forfeiture ; nor do we deny the obligation of a foreign sovereign to conform to pre-existing laws, as to offences—and as to the acquisition of property ; nor his liability for his *private* debts and contracts. *Vattel*, 426. *B.* 2. *c.* 18. *sect.* 340. 344. 346. So if a sovereign descend from the throne and become a merchant, he submits to the laws of the country. If he contract private debts, his private funds are liable. So if he charter a vessel, the cargo is liable for the freight.

But in the present case he appears in his sovereign character ; the commander of the national vessel exercises a part of his sovereign power ; and in such a case no consent to submit to the ordinary judicial tribunals

of the country can be implied. Such implied consent must depend on the *act*, on the *person*, and on the *subject*.

Such consent is implied where the municipal law, previously provides and changes the law of nations—where it regulates trade—where it defines and punishes crimes, and where it fixes the tenure of property real or personal. But it cannot be implied where the law of nations is unchanged —nor where the implication is destructive of the independence, the equality, and dignity of the sovereign. Such a jurisdiction is not given
p. 124 by the constitution of the United States, nor | is it mentioned in the judiciary acts. If so important a jurisdiction was intended to be given, it would certainly have been mentioned and regulated by law. It cannot be derived from any practical construction of our laws. In 1794, the public vessels were not seized, but ordered away. The impost law, (*Laws of U. S. Vol.* 4. *p.* 331. *sect.* 31) excepts public vessels, from the obligation to make report and entry. The act of *March* 3*d*, 1805, (*Vol.* 7. *p.* 334, *sect.* 4) for the preservation of peace in our ports and harbors, gives authority to the president to prohibit the foreign armed vessels from entering our ports, and to order those to depart which may have entered, and if they refuse to depart, to prohibit all intercourse with them, and to drive them away ; but not to seize them. Public vessels were excepted from the *embargo*, in 1807 and 1808. (*Laws U. S. Vol.* 9. *p.* 7. *sect.* 2. *and p.* 243. *sect.* 1, 2, *and* 3.)

The judicial construction of the law by the courts in Pennsylvania, was, that a state could not be subjected to judicial process, unless by the words of the Constitution of the United States : and many sound minds were of opinion that even those did not give the jurisdiction ; and when it was finally decided in the Supreme Court of the United States that a suit might be maintained against a state in the Federal Courts, the states amended the constitution so as not to admit of that construction.

The case of *Nathan v. the Commonwealth of Virginia*, 1 *Dall.* 77, was a foreign attachment against some military stores belonging to the state of Virginia : the object of which was to compel an appearance ; and the court refused to compel the sheriff to return the writ ; being of opinion that Virginia being a sovereign state could not be compelled to appear in a court in Pennsylvania. The present process against the vessel is to compel an appearance. It is true the master may give security ; but to compel him to do so is to bring the emperor into court, and to subject him, in his sovereign character, to the jurisdiction of the courts of the United States.

p. 125 The *Cassius*, (in the case of *United States v. Judge* | *Peters*, 3 *Dall.* 121, and *Ketland, qui tam* v. *the Cassius*, 2 *Dall.* 365) had violated a municipal law of the United States ; yet, being a public vessel of France, the government of the United States directed the attorney general to file a suggestion,

stating the character of the vessel, which it was supposed would have taken the case out of the jurisdiction of the court. But the case went off upon another objection to the jurisdiction.

There is then no municipal law, nor any practical construction by the executive, the legislative, or the judicial department of our government, which authorizes the jurisdiction now claimed; we can only have recourse to the law of nations to try the validity of that claim. That law requires the consent of the sovereign, either express or implied, before he can be subjected to a foreign jurisdiction, 2 *Rutherford*, 163 *to* 170. There is no express assent of a foreign sovereign to the jurisdiction over his prerogative. The distinction is between his private acts, and his acts as sovereign, and between his private and his public property. *Vat. B.* 2, *p.* 343, *ch.* 14. § 213, 216. 2 *Ruth.* 536. *Vat.* 707, *B.* 4. *c.* 7, § 108, *Martyn* 181. *Ruth.* 54. *Galliani B.* 1, *c.* 5.

The cases of implied assent are, 1. *Trade*, when his goods are liable for freight, or liable to his factor for advances, &c. or liable to pay duties. In all which cases there is a specific lien on the goods. 2. In case he acquire property in the country, whether real or personal. 3. In case of offences against existing laws, such as entering when prohibited, or breaking the peace when in port. But the law of nations excludes the implication and presumption in every case where the sovereignty is concerned—as 1. In the case of an ambassador—2. Of the sovereign himself—3. The passing of his armies through the country, in which case he retains all his rights of sovereignty and jurisdiction over his army—4. In case of his navy passing through our waters.

The British government, although it authorizes the search of private ships for their seamen, disclaims the right to search ships of war, even on the ocean, the place of common jurisdiction.

Bynkershoek, *p.* 39, *c.* 4. for the first time asserts a | principle not p. 126
recognized by any prior writer: viz. that the goods of the sovereign, however acquired, whether of a public or private nature, are liable to process to compel an appearance. But he does not cite one adjudged case, nor one writer upon the law of nations to support him. The only case he cites is from *Huber*, and that denies the jurisdiction. The *exima* which he cites is only a kind of chronicle or journal, like the annual register.

It is a book of no authority. The case of the queen of Spain's ship arrested at Flushing, and the queen of Bohemia's in 1654, which were released by the states general, are against him. His book clearly shows that the practice of nations is against his doctrine. It is evident that he alludes to a practice of citation in the states of Holland, or among the members of the Germanic body.

The general principle is against him. He is opposed by other writers

and supported by none. He is opposed by the practice of nations and supported by no judicial decision.

If the courts of the United States should exercise such a jurisdiction it will amount to a judicial declaration of war. There is already a case before this court in which it will be called upon to decide whether St. Domingo be an independent nation ; and another in which it is to determine whether the crown of Spain belongs to Ferdinand the 7th or Joseph Bonaparte. If this court is to exercise jurisdiction upon subjects of this nature, it will absorb all the functions of government, and leave nothing for the legislative or executive departments to perform.

HARE, *contra.*

The position which we are to meet, is understood to be this, That the possession of property by a foreign sovereign, without the limits of his jurisdiction, and within the limits of the United States, precludes all enquiry into the title of the thing within his possession.

This principle, we say, is unfounded. The general rule is that all
p. 127 sovereignty is strictly local, and cannot | be exercised beyond the territorial limits. This flows from the nature of sovereignty, which being *supreme* power, cannot exist where it is not supreme. 4 *Cranch*, 279, *Rose v. Himely*. There is no instance of its actual extra-territorial operation, except where by fiction of law it is supposed to be territorial ; or at most where it exclusively operates upon its own subjects. The household of an ambassador is supposed to be within the territorial jurisdiction of his sovereign. *Vattel* 448, *Martyn* 228, 230.

In other respects the rights of an ambassador are his own rights founded in considerations appertaining exclusively to the ambassadorial character. In the vessels belonging either to his nation or to himself, he may exercise, on the high seas, a limited jurisdiction. The same principle operates here. The ship is considered as part of his territory. But in this case his jurisdiction extends over his own subjects only. His armies abroad are also subject to his jurisdiction, but this is the result of positive compact, without which they cannot go abroad.

The general principle then being in our favor, our adversaries must show the exception.

Whatever is within the extent of a country, is within the authority of its sovereign ; and if any dispute arises concerning the effects within the country or passing through it, it must be decided by the judge of the place. *Vat.* 446.

Unless the case now before the court be an exception, this rule is universal. It grows out of the first principles of government, which in giving security assumes jurisdiction.

The general authority over the property of foreigners is as absolute as over the property of subjects.

The arguments in favor of the exception are drawn rather from inconvenience than from principle, but cannot be supported upon either ground.

As it regards the private property of the sovereign, | why not assume p. 128
jurisdiction ? Because it is said, it would violate his dignity, inasmuch as it is to be presumed that he will never do wrong. Such a presumption, contrary to the fact, may be calculated to give him weight at home, but can be of no use abroad. It is not universally adopted even at home. The king of England may be sued by *monstrans de droit*. States may prescribe the mode in which they shall be sued. This is a matter of internal regulation. Will you then respect a foreign sovereign more than his own subjects are bound to respect him ?

If the sovereign of any free country should unlawfully seize the goods of one of his subjects, he would be liable in his private capacity like any other person. As regards the public property of a foreign sovereign, why should there be any distinction, where the only object of the suit is merely to ascertain the right.

His public service may suffer, but will you respect that service at the expence of the rights of your own citizens ?

But it is said, if you arrest this vessel you may arrest a fleet. This is true—and when a foreign fleet shall have been created by the plunder of our own citizens, let it be arrested.

But the danger of such a case is remote and improbable. The libel must be supported by oath and probable cause. A judge would not hastily direct process against a fleet.

But consider the inconveniences on the other side. Your own citizens plundered. Your national rights violated. Your courts deaf to the complaints of the injured. Your government not redressing their wrongs, but giving a sanction to their spoliators.

The argument of our opponents allows no remedy to the citizen although dispossessed of his property within the limits of our own territory. Although the ship should have been seized in the Delaware, and converted into a public armed vessel, we are supposed to have no redress. It does not appear upon the face of the present proceedings, that this was not the case. |

The argument of inconvenience is equally applicable to cases in p. 129
which our own laws authorize process to issue. Thus, under the act of *June 5th*, 1794, § 3, *Vol. 3. p.* 89, if any ship shall be armed in any of the waters of the United States, with intent to be employed in the service of any foreign state to cruize against the subjects of another foreign state with whom the United States are at peace, such ship shall be forfeited. So also in case a foreign armed ship should be found smuggling. In cases of *tort* then, there is a remedy against the public

armed ship of a foreign sovereign. It is obvious also that there must be such remedy in cases of *contract*. As in the case of material men for repairs—Bottomry and mortgage—wreck and pledges. If he may pledge, the pledge may be proceeded against. If then there are cases both of *tort* and contract in which there is a remedy, why not in this ?

It is in vain to urge against the *right* of proceeding, the inconveniences that may result from the *mode*.

On principle, then, there is no foundation for the exception. Nor is it warranted by authority.

Vattel, B. 2, § 83, says ' Many sovereigns have *fiefs*, and other proper-' ties, in the lands of another prince : *they therefore possess them in the* ' *manner of other individuals*.' Thus the kings of England did homage for the lands they held in France.

Martins (*p.* 85, 182, *Book* 5, *sect.* 9) says that the supreme police extends over the property of a sovereign.

The cases of *Glass v. Sloop Betsy*, 3 *Dall.* 6—*Rose v. Himely and Hudson v. Guestier*, 4 *Cranch* 279. The *Cosmopolite*, 3 *Rob.* 269, and the authority of *Azuni* 245, 246, affirm the right, in certain cases, of examining the legality of the prizes of foreign sovereigns.

Prizes are made for account of the sovereign. In England they are distributed according to the prize act ; but if made by a non-commissioned vessel, they are *droits* of the admiralty. |

p. 130 The possession of the captors is the possession of the sovereign. In these cases therefore the right of the sovereign to the thing in his possession is subjected to judicial investigation.

Bynkershoek upon Ambassadors, 40 to 46, expressly states that the property of the sovereign, public and private, is subject to the authority of the judge of the place. 2 *Rutherford* 476, 382. The case of the Swedish convoy is also an authority to the same effect.

The Constitution of the *United States, Art.* 3, *sect.* 2, expressly gives the courts of the United States jurisdiction in cases between citizens and *foreign states*.

The cases cited on the other side refer only to suits brought directly against a sovereign, or to compel his appearance. But such cases are wholly inapplicable, because not brought in consequence of your jurisdiction over *the thing* within your territory, but to create a jurisdiction over the person which is without it.

In Massachusetts suits between foreigners by process of attachment, cannot be sustained ; but the right to the thing in dispute, whether between foreigners or others, will be ascertained there.

You cannot draw to your jurisdiction those who owe you neither a local nor an absolute allegiance ; but you may enquire into the validity of every claim to a thing within your jurisdiction.

This doctrine is peculiarly applicable to sovereigns :—

In the case of *Olmstead v. Rittenhouse's executors*, (5 *Cranch* 115, under the name of *United States v. Judge Peters*) the state of Pennsylvania contended that the District Court had not jurisdiction, because she, as a sovereign state, claimed the money in the hands of the executors, and was really the party interested ; but this court decided that, as the state was not ostensibly a party, and as *the thing* was within the jurisdiction of the Court, the District Court should proceed to enforce its sentence ; thereby clearly marking the distinction between a suit against a sovereign, and a process against *a thing* claimed by a sovereign. |

HARPER, *on the same side.* p. 131

Two questions are raised in this case.

1. Whether this be a case of admiralty jurisdiction, and

2. Whether a judicial remedy can be given for a wrong done by a foreign sovereign.

1. The libel states the seizure to have been made 'during the voyage'—and the answer to the claim denies that she was seized in port—it follows therefore that she must have been seized upon the high seas.

2. As to the general power to interfere in case of an illegal seizure made by a foreign sovereign.

Sovereignty is absolute and universal. This is the general rule. But it is contended that there is an exception in four cases.

1. As to the person of a foreign sovereign.

2. As to his ambassadors.

3. As to his armies ; and

4. As to his property—which last is said to be an inference from the three former cases. But the three former cases are all founded upon consent, and the latter is not ; consequently there can be no analogy between them. Besides, these cases are not exceptions to the sovereignty, but merely exemptions from the ordinary judicial process, by consent of the sovereign. If a foreign sovereign comes secretly into the country, he is not protected from ordinary process ; but when he comes openly in his character as a sovereign, an assent is implied, and he comes with all the immunities incident to his dignity, according to the common understanding of the word. All the cases supposed to be against us are founded upon consent. *Bynkershoek* also places it upon the ground of consent, and he is supported by *Barbeyrac* and *Galliani.* |

The positive authorities against the exemption of the property of p. 132
the sovereign from the ordinary judicial process, are *Bynkershoek* 25, *Martins* 182, and 2 *Rutherford* 476. The Constitution of the United States takes for granted the suability of the states, and merely provides the means of carrying the principle into effect. The exemption of the

sovereign himself, his ambassador and his armies, depends upon particular reasons which do not apply to his property, nor to his ships of war.

PINKNEY, *Attorney General, in reply.*

When wrongs are inflicted by one nation upon another, in tempestuous times, they cannot be redressed by the judicial department. Its power cannot extend beyond the territorial jurisdiction. However unjust a confiscation may be, a judicial condemnation closes the judicial eye upon its enormity. The right to demand redress belongs to the executive department, which alone represents the sovereignty of the nation in its intercourse with other nations.

The simple fact in this case is, that an individual is seeking, in the ordinary course of justice, redress against the act of a foreign sovereign. But the rights of a foreign sovereign cannot be submitted to a judicial tribunal. He is supposed to be out of the country, although he may happen to be within it.

An ambassador is unquestionably exempt from the ordinary jurisdiction; but if he commit violence it may be lawfully repelled by the injured individual—so if he commit public violence he may be opposed by the nation. This right arises from the necessity of the case. But as to ordinary cases he is to be referred to the tribunals of his own country. In cases where those tribunals cannot interfere to *prevent* the injury, the jurisdiction of the country, for that purpose, may interfere; but when the act is done, and prevention is too late, he must be referred to his own tribunals.

We claim for this vessel, an immunity from the ordinary jurisdiction,
p. 133 as extensive as that of an ambassador, | or of the Sovereign himself;—but no further.—If she attempt violence, she may be restrained.

The constitution of the United States, decides nothing—it only provides, a tribunal, if a case can by possibility exist.

The statutes of the United States, are in hostility to the idea of jurisdiction.—Private vessels are made liable to confiscation, but public vessels are to be driven away. The remedy is by opposing Sovereign to Sovereign, not by subjecting him to the ordinary jurisdiction.

The jurisdiction over things and persons, is the same in substance. The arrest of the thing is to obtain jurisdiction over the person.

A distinction is taken between civil and territorial jurisdiction, civil jurisdiction is referred to consent;—it binds all who have consented. Territorial jurisdiction goes farther; it operates upon those who have not assented—such as *aliens*—but the alien must do something—he must come within the territory whereby he submits to the jurisdiction—so if he purchases property within the country, or sends property into the territory, in *ordinary* cases, his assent is implied. But if the property

of an alien, be forcibly or fraudulently carried within the territory, no consent is implied, and consequently there is no ground for jurisdiction.

If a foreign Sovereign be found in the territory, he is not liable to the ordinary jurisdiction. Vattel places his exemption on the ground, that he did not intend to submit to it.—Rutherford, on the ground of the assent of the other Sovereign.

The case of the Ambassador is precisely in point—his immunities depend upon the implied assent. The reason is, that he may be independent. Grotius, places it upon the conventional, and Rutherford, upon the natural law of nations.

So in the case of the passage of troops through a neutral territory, the permission to pass, implies a compact, that they should enjoy all necessary immunities. | From the nature of the case, they cannot be p. 134
subject to the ordinary jurisdiction of the country, through which they pass. To suffer one of the soldiers to be arrested for a debt due to a citizen of that country, would be inconsistent with the permission to pass.

We are asked, whence we infer the immunity of the public armed vessel of a sovereign. We answer from the nature of sovereignty, and from the universal practice of nations from the time of *Tyre and Sidon.*

Sovereigns are equal. It is the duty of a sovereign, not to submit his rights to the decision of a *co-sovereign.* He is the sole arbiter of his own rights. He acknowledges no superior, but God alone. To his equals, he shows respect, but not *submission.*

This vessel is not the ordinary property of a sovereign.—It is his *national* property—a public ship of war duly commissioned. There is no difference in principle between such a vessel, and an army passing through the territory. She has the same rights. She has your permission to pass, and you are bound to give her all necessary immunities. You gave her an asylum as the property of a great and powerful nation, you must not suffer her to be thereby entrapped in the fangs of a municipal court. She was charged with public despatches ; she visited your ports *in itinere.* It was a deflexion merely, that she might more effectually perform her voyage. It was a mere passage through your jurisdiction. Her commander had an unquestionable right to exclusive jurisdiction over her crew. In the eye of the law of nations, she was at home, whether in your ports, or upon the high seas. The exemption from delay, is more necessary than the exemption from final condemnation.

By the usage of states, no other evidence is required of the property of a sovereign than his commission and flag. This is strong evidence, that such property is not subject to the ordinary jurisdiction of the country. Otherwise other documents would be required and would be furnished. No others are required at sea, nor on shore. This usage

of nations is universally known, and as the vessel sailed upon the faith
p. 135 of such a usage, | good faith requires that you should receive the flag and commission as evidence of the character of the vessel.

This court will not decide this case upon the authority of the slovenly treatise of Bynkershoek, or the ravings of that sciolist Martins, but upon the broad principles of national law, and national independence. One would as soon consult Gibbons or Hobbs, for the doctrines of our holy religion as Martins for the principles of the law of nations. Bynkershoek, upon this point, draws his authorities from Dutch courts, and Dutch jurists. Not one of his cases was adjudged, except that cited from Huber. And in one of the cases, the states general requested that the vessel should be discharged, which had been arrested in Zealand, for a debt due from Spain, saying that they would write to the Queen of Spain, to pay her debts, or they would be obliged to issue letters of marque and reprisal,—which was the proper course. The other cases were only abortive attempts to subject national property to the ordinary jurisdiction of the country.

The case of the Swedish convoy, was upon the ground, that the convoy resisted by force the right of search. It was *war quoad hoc*; and the seizure was made as prize of war. But that case was never decided.

In the case of *Glass v. The Sloop Betsy*, the privateers commission was to capture the property of an enemy, but she had captured that of a friend.—The court did not subject the *privateer* to their jurisdiction, but the prize which she had wrongfully made.

March 3d. All the Judges being present.

MARSHALL, *Ch. J.* Delivered the opinion of the Court as follows:

This case involves the very delicate and important inquiry, whether an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States.

The question has been considered with an earnest solicitude, that
p. 136 the decision may conform to those principles | of national and municipal law by which it ought to be regulated.

In exploring an unbeaten path, with few, if any, aids from precedents or written law, the court has found it necessary to rely much on general principles, and on a train of reasoning, founded on cases in some degree analogous to this.

The jurisdiction of *courts* is a branch of that which is possessed by the nation as an independent sovereign power.

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the

restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction ; but, if understood, not less obligatory.

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage. |

A nation would justly be considered as violating its faith, although p. 137
that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another ; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to wave the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

1st. One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory.

If he enters that territory with the knowledge and license of its sovereign, that license, although containing no stipulation exempting his person from arrest, is universally understood to imply such stipulation.

Why has the whole civilized world concurred in this construction? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation, and it is to avoid this subjection | p. 138 that the license has been obtained. The character to whom it is given, and the object for which it is granted, equally require that it should be construed to impart full security to the person who has obtained it. This security, however, need not be expressed; it is implied from the circumstances of the case.

Should one sovereign enter the territory of another, without the consent of that other, expressed or implied, it would present a question which does not appear to be perfectly settled, a decision of which, is not necessary to any conclusion to which the Court may come in the cause under consideration. If he did not thereby expose himself to the territorial jurisdiction of the sovereign, whose dominions he had entered, it would seem to be because all sovereigns impliedly engage not to avail themselves of a power over their equal, which a romantic confidence in their magnanimity has placed in their hands.

2d. A second case, standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers.

Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction suppose him to be extra-territorial, and, therefore, in point of law, not within the jurisdiction of the sovereign at whose Court he resides; still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of ex-territoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it.

This consent is not expressed. It is true that in some countries, and in this among others, a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess.

The assent of the sovereign to the very important and extensive p. 139 exemptions from territorial jurisdiction | which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent

that he shall possess those privileges which his principal intended he should retain—privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

In what cases a minister, by infracting the laws of the country in which he resides, may subject himself to other punishment than will be inflicted by his own sovereign, is an inquiry foreign to the present purpose. If his crimes be such as to render him amenable to the local jurisdiction, it must be because they forfeit the privileges annexed to his character; and the minister, by violating the conditions under which he was received as the representative of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original assent, has ceased to be entitled to them.

3d. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.

In such case, without any express declaration waving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining | the exclusive command and p. 140
disposition of this force. The grant of a free passage therefore implies a waver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

But if, without such express permit, an army should be led through the territories of a foreign prince, might the jurisdiction of the territory be rightfully exercised over the individuals composing this army?

Without doubt, a military force can never gain immunities of any other description than those which war gives, by entering a foreign territory against the will of its sovereign. But if his consent, instead of being expressed by a particular license, be expressed by a general declaration that foreign troops may pass through a specified tract of country, a distinction between such general permit and a particular license is not perceived. It would seem reasonable that every immunity which would be conferred by a special license, would be in like manner conferred by such general permit.

We have seen that a license to pass through a territory implies immunities not expressed, and it is material to enquire why the license itself may not be presumed?

It is obvious that the passage of an army through a foreign territory will probably be at all times inconvenient and injurious, and would often be imminently dangerous to the sovereign through whose dominion it passed. Such a practice would break down some of the most decisive distinctions between peace and war, and would reduce a nation to the necessity of resisting by war an act not absolutely hostile in its character, or of exposing itself to the stratagems and frauds of a power whose integrity might be doubted, and who might enter the country under deceitful pretexts. It is for reasons like these that the general license to foreigners to enter the dominions of a friendly power, is never understood to extend to a military force; and an army marching into the dominions of another sovereign, may justly be considered as committing an act of hostility; and, if not opposed by force, acquires
p. 141 no privilege by its irregular and | improper conduct. It may however well be questioned whether any other than the sovereign power of the state be capable of deciding that such military commander is without a license.

But the rule which is applicable to armies, does not appear to be equally applicable to ships of war entering the ports of a friendly power. The injury inseparable from the march of an army through an inhabited country, and the dangers often, indeed generally, attending it, do not ensue from admitting a ship of war, without special license, into a friendly port. A different rule therefore with respect to this species of military force has been generally adopted. If, for reasons of state, the ports of a nation generally, or any particular ports be closed against vessels of war generally, or the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports and to remain in them while allowed to remain, under the protection of the government of the place.

In almost every instance, the treaties between civilized nations contain a stipulation to this effect in favor of vessels driven in by stress of weather or other urgent necessity. In such cases the sovereign is bound by compact to authorize foreign vessels to enter his ports. The treaty binds him to allow vessels in distress to find refuge and asylum in his ports, and this is a license which he is not at liberty to retract. It would be difficult to assign a reason for withholding from a license thus granted, any immunity from local jurisdiction which would be implied in a special license.

If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly powers, the conclusion seems

irresistable, that they enter by his assent. And if they enter by his assent necessarily implied, no just reason is perceived by the Court for distinguishing their case from that of vessels which enter by express assent. |

In all the cases of exemption which have been reviewed, much has p. 142
been implied, but the obligation of what was implied has been found equal to the obligation of that which was expressed. Are there reasons for denying the application of this principle to ships of war ?

In this part of the subject a difficulty is to be encountered, the seriousness of which is acknowledged, but which the Court will not attempt to evade.

Those treaties which provide for the admission and safe departure of public vessels entering a port from stress of weather, or other urgent cause, provide in like manner for the private vessels of the nation ; and where public vessels enter a port under the general license which is implied merely from the absence of a prohibition, they are, it may be urged, in the same condition with merchant vessels entering the same port for the purposes of trade who cannot thereby claim any exemption from the jurisdiction of the country. It may be contended, certainly with much plausibility if not correctness, that the same rule, and same principle are applicable to public and private ships ; and since it is admitted that private ships entering without special license become subject to the local jurisdiction, it is demanded on what authority an exception is made in favor of ships of war.

It is by no means conceded, that a private vessel really availing herself of an asylum provided by treaty, and not attempting to trade, would become amenable to the local jurisdiction, unless she committed some act forfeiting the protection she claims under compact. On the contrary, motives may be assigned for stipulating, and according immunities to vessels in cases of distress, which would not be demanded for, or allowed to those which enter voluntarily and for ordinary purposes. On this part of the subject, however, the Court does not mean to indicate any opinion. The case itself may possibly occur, and ought not to be prejudged.

Without deciding how far such stipulations in favor of distressed vessels, as are usual in treaties, may exempt private ships from the jurisdiction of the place, it may safely be asserted, that the whole reasoning upon which such exemption has been implied in other cases, | applies p. 143
with full force to the exemption of ships of war in this.

' It is impossible to conceive,' says Vattel, ' that a Prince who sends an ambassador or any other minister can have any intention of subjecting him to the authority of a foreign power ; and this consideration furnishes an additional argument, which completely establishes the

independency of a public minister. If it cannot be reasonably presumed that his sovereign means to subject him to the authority of the prince to whom he is sent, the latter, in receiving the minister, consents to admit him on the footing of independency; and thus there exists between the two princes a tacit convention, which gives a new force to the natural obligation.'

Equally impossible is it to conceive, whatever may be the construction as to private ships, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this cannot be presumed, the sovereign of the port must be considered as having conceded the privilege to the extent in which it must have been understood to be asked.

To the Court, it appears, that where, without treaty, the ports of a nation are open to the private and public ships of a friendly power, whose subjects have also liberty without special license, to enter the country for business or amusement, a clear distinction is to be drawn between the rights accorded to private individuals or private trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation.

The preceding reasoning, has maintained the propositions that all exemptions from territorial jurisdiction, must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act. |

p. 144 When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter can never be construed to grant such exemption.

But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation; acts under

the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license therefore under which such vessel enters a friendly port, may reasonably be construed, and it seems to the Court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rights of hospitality.

Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place; but certainly in practice, nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception.

Bynkershoek, a jurist of great reputation, has indeed maintained that the property of a foreign sovereign is not distinguishable by any legal exemption from the | property of an ordinary individual, and has p. 145
quoted several cases in which courts have exercised jurisdiction over causes in which a foreign sovereign was made a party defendant.

Without indicating any opinion on this question, it may safely be affirmed, that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force, which upholds his crown, and the nation he is entrusted to govern.

The only applicable case cited by Bynkershoek, is that of the Spanish ships of war seized in Flushing for a debt due from the king of Spain. In that case, the states general interposed; and there is reason to believe, from the manner in which the transaction is stated, that, either by the interference of government, or the decision of the court, the vessels were released.

The case of the Spanish vessels is, it is believed, the only case furnished by the history of the world, of an attempt made by an individual to assert a claim against a foreign prince, by seizing the armed vessels of the nation. That this proceeding was at once arrested by the government, in a nation which appears to have asserted the power of proceeding in the same manner against the private property of the prince, would seem to furnish no feeble argument in support of the universality of the opinion in favor of the exemption claimed for ships of war. The dis-

tinction made in our own laws between public and private ships would appear to proceed from the same opinion.

It seems then to the Court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for
p. 146 their reception, are to be considered | as exempted by the consent of that power from its jurisdiction.

Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions therefore which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country, in which it is found, ought not, in the opinion of this Court, to be so construed as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to wave its jurisdiction.

The arguments in favor of this opinion which have been drawn from the general inability of the judicial power to enforce its decisions in cases of this description, from the consideration, that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion, are of great weight, and merit serious attention. But the argument has already been drawn to a length, which forbids a particular examination of these points.

The principles which have been stated, will now be applied to the case at bar.

In the present state of the evidence and proceedings, the Exchange must be considered as a vessel, which was the property of the Libellants, whose claim is repelled by the fact, that she is now a national armed vessel, commissioned by, and in the service of the emperor of France. The evidence of this fact is not controverted. But it is contended, that it constitutes no bar to an enquiry into the validity of the title, by which the emperor holds this vessel. Every person, it is alleged, who is entitled
p. 147 to property brought within the jurisdiction of our Courts, has a | right to assert his title in those Courts, unless there be some law taking his case out of the general rule. It is therefore said to be the right, and if it be the right, it is the duty of the Court, to enquire whether this title has been extinguished by an act, the validity of which is recognized by national or municipal law.

If the preceding reasoning be correct, the Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.

If this opinion be correct, there seems to be a necessity for admitting that the fact might be disclosed to the Court by the suggestion of the Attorney for the United States.

I am directed to deliver it, as the opinion of the Court, that the sentence of the Circuit Court, reversing the sentence of the District Court, in the case of the Exchange be reversed, and that of the District Court, dismissing the libel, be affirmed.

The Maryland Insurance Company v. Wood.

(7 Cranch, 402) 1813.

The letter of Mr. Merry to the secretary of state, of the 12th of April, 1804, extended to the island of Curraçoa, the order of the lords commissioners of the admiralty of the 5th of January, 1804, respecting the blockade of Martinique & Gaudalope:

March 3d.

ERROR to the Circuit Court for the district of Maryland, in an action of covenant on a policy upon the schooner William and Mary ' at and from Baltimore to Laguira, with liberty of one other neighboring port, and at and from them or either of them back to Baltimore '—' Warranted by the assured to be an American bottom, proof of which to be required in the United States only.'

The former judgment of the Circuit Court, in this case, having been reversed (*see* 6 *Cranch*, p. 29), and the cause remanded for a new trial, the verdict and judgment were again in favor of the original Plaintiff. The Defendants, took only one bill of exceptions which stated the execution of the policy, the sailing of the vessel with proper documents as an American bottom from Baltimore on the 8th of March, 1805, upon the voyage insured ; her arrival off Laguira on the 24th of the same month, where she remained three days laying off and on, vainly endeavoring to obtain permission to enter the port, and on the 31st sailed towards the port of | Amsterdam, in the Island of Curraçoa, by the direct and p. 403
accustomed route, with a view and intention of ascertaining by enquiry of British ships of war, or other vessels, whether the port of Amsterdam was then in a state of blockade, and to enter it if it should not be blockaded, but if it should be blockaded, not to attempt to enter it, but to proceed

to St. Thomas's or Porto Rico. That Amsterdam was a neighboring port to Laguira, being distant about 147 miles. That when she approached Amsterdam, being distant about 30 miles, the master discovered a British vessel at the distance of 21 miles, whereupon he altered the course of the schooner, and stood directly towards the British vessel for the purpose of inquiring whether Amsterdam was still in a state of blockade; that while so standing for the British vessel, which was a frigate then actually supporting the blockade of the port of Amsterdam, the schooner was captured by the frigate and sent into Jamaica, and there condemned for breach of the blockade of the port of Amsterdam, whereby she was wholly lost to the Plaintiff. That on the 16th of May, 1805, the Plaintiff having received intelligence of the capture, abandoned the vessel in due time to the underwriters, who refused to accept the abandonment.

That on the 27th of October, 1803, the government of the United States made to the British government, through its charge d'affairs in the United States, a representation on the subject of a blockade, then recently notified, of the Islands of Martinique and Gaudalope; which representation is set forth at large in the bill of exceptions, being a letter from Mr. Madison, then Secretary of state, to Mr. Thornton, the British charge d'affairs, dated the 27th of October, 1803.

That on the 5th of January, 1804, the British government, in consequence of that representation, issued an order to its commanding naval officer in the West Indies and to its Courts of vice admiralty there, relative to the blockade of Martinique and Gaudalope; which order is as follows:

'*Admiralty office*, 5th January, 1804.

SIR,

Having communicated to the lords of the admiralty, lord Hawkesbury's letter of the 23d ult. enclosing the | copy of a despatch, which his p. 404 lordship had received from Mr. Thornton, his majesty's charge d'affairs in America, on the subject of the blockade of the Islands of Martinique and Gaudalope, together with the report of the advocate general thereupon, I have their lordships' commands to acquaint you for his lordships' information that they have sent orders to commodore Hood not to consider any blockade of those Islands as existing unless in respect of particular ports which may be actually invested, and then not to capture vessels bound to such ports unless they shall have been previously warned not to enter them; and that they have also sent the necessary directions on the subject to the judges of the vice admiralty Courts in the West Indies and America.

I am, &c.,

EVAN NEPEAN.

GEORGE HAMMOND, Esq.'

That on the 12th of April, 1804, the British government, by its minister plenipotentiary in the United States, communicated the afore-

said order to the government of the United States who caused it to be immediately published in the public newspapers.

That on the same 12th of April, 1804, the said British minister plenipotentiary officially made known to the government of the United States, that the siege of the island of Curraçoa had been converted into a blockade, which communication was as follows:

'*Mr. Merry to Mr. Madison.*

Washington, April 12th, 1804.

SIR,

I have the honor to acquaint you that I have just received a letter from rear admiral, sir John Duckworth, commander in chief of his majesty's squadron at Jamaica, dated the second of last month, in which he desires me to communicate to the government of the United States, that he has found it expedient for his majesty's service to convert the siege, which he lately attempted of Curraçoa into a blockade of that Island.|

I cannot doubt, sir, that this blockade will be conducted conformably p. 405
to the instructions which, (as I have the honor to acquaint you in another letter of this date,) have been recently sent on this subject, to the commander in chief of his majesty's forces, and to the judges of the vice admiralty Courts in the West Indies, should the smallness of the Island of Curraçoa still render necessary any distinction of the investment being confined to particular ports.

I have the honor to be, &c.

ANT. MERRY.'

That Travers, the master of the schooner William and Mary, heard a report at Baltimore, before he sailed, that Amsterdam was in a state of blockade; and that he was informed, before he sailed from Baltimore, by the master of an American vessel, that about four months before the time of giving that information, he arrived with his vessel near the port of Amsterdam, and there met with a squadron of British ships of war then blockading that port, and was warned off by the commander of the squadron, with his register endorsed in the usual manner.

That Travers in the course of his voyage fell in with a strong French squadron in lat. 15, long. 63, which was sailing westward. That the port of Amsterdam is in lat. 11 deg. 55 min.–long. 68.

That while laying off Laguira to endeavor to obtain permission to enter the port, or to anchor his vessel, he was informed by a merchant at Laguira, to whom he had been introduced by a letter, and through whom he made application for permission as aforesaid, that the port of Amsterdam was then free from blockade; and was advised by the said merchant to proceed thither with his vessel—that the port of Laguira and all the ports on the Spanish main were then shut against foreigners, whereby he was prevented from going on shore and from making enquiries otherwise than by writing from his vessel to some person on shore.

That the Island of Buenos Ayres was then a dependency of Curraçoa,

p. 406 distant from it about twenty miles east, and | is a small island having no port, except a road-stead about the middle of its length on the east side, where there was a small battery and military post. That the cruizing ground of vessels blockading Curraçoa, was between that Island and Buenos Ayres, which latter was included in the blockade, as were also all the other ports of the Island of Curraçoa. That Travers did not attempt to enter the port of Amsterdam, nor sail towards it with an intention of entering it if blockaded, but merely for the purpose of ascertaining, by any lawful and proper means in his power, whether it was still in a state of blockade, of entering it if it was not, and of proceeding elsewhere if it was.

That when he sailed from Laguira as aforesaid he had, from the facts and circumstances above mentioned, reasonable ground of belief that the blockade had ceased, and had no means of obtaining any further information on the subject at any neighboring port or place.

Whereupon the Plaintiff prayed the Court to instruct the jury that if they believed the matters so given in evidence by him, then his right of recovery in this action is not affected by the conduct of Travers in proceeding as aforesaid from Laguira towards Amsterdam for the purposes aforesaid, which instruction the Court gave, and also the further direction, that if they should believe that Travers intended, while at Laguira, to violate the blockade of Amsterdam, and attempted it by sailing towards that port, and within the limits of the cruizing ground; in such case his conduct was unlawful; and the Defendants were thereby discharged from any responsibility upon the policy.

To this instruction the Defendants excepted and brought their writ of error.

MARTIN, *for Plaintiffs in error.*

When this case was here before it was erroneously supposed that the order of the 5th of January, 1804, applied to the Island of Curraçoa, as well as to those of Gaudalope and Martinique. It was not until the 12th of April following, that the blockade of Curraçoa was notified to our
p. 407 government by Mr. Merry, who gives | *his opinion* that the former order would be extended to this blockade. But it is merely his *opinion*; he had no authority to bind his government upon that subject; and his opinion could not justify the master of this vessel in going to the blockading squadron for information.

If he acted upon the information of the minister he acted at his peril. 5, *Rob.* 74, 234—1, *Rob.* 144. The *Neptunus*—2, *Rob.* 92. He ought to have called at *Buenos Ayres* for information.—*Park*, 408, 9, *Marshall*, 321.

LIVINGSTON, *J.* Thought this case could not be distinguished from the one which was here before. It appears to be only an application to this Court to reverse its own decision.

STORY, *J.* Thought the letter of Mr. Merry was conclusive upon the subject.

JOHNSON, *J.* It does not appear to be so clear a case as the other.

MARSHALL, *Ch. J.* had formed no opinion upon this case. It seemed to him to be different from the other.

HARPER, *for the Defendant in error*, requested that the opinion of the Court might be given in writing.

MARSHALL, *Ch. J.* I understand the opinion of the Court to be, that the letter of Mr. Merry puts the case on the same ground as if the blockade had been of Martinique or Gaudalope.

HARPER. That is, that it extended to this case the benefit of the order of the 5th of January, 1804.

MARSHALL, *Ch. J.* I so understand it.

LIVINGSTON, *J.* Afterwards delivered the opinion of the Court in writing, as follows:

It is the opinion of the Court, that the communication of the British minister to the American government on the 12th of April, 1804, relative to the blockade of Curraçoa, furnished a sufficient excuse for the assured's proceeding | towards that Island for the purpose of enquiring as to its p. 408
continuance, and that his doing so was no violation of his neutrality.

The Court does not mean to be understood as giving any opinion on the effect of such conduct if no such communication had been made.

The judgment of the Circuit Court is affirmed with costs.

William Williams and others, appellants, v. George Armroyd and others, appellees (The Fortitude).

(7 Cranch, 423) 1813.

A sentence of a foreign tribunal condemning neutral property under an edict unjust in itself, contrary to the law of nations, and in violation of neutral rights; and which has been so declared by the legislative and executive departments of the government of the United States; changes the property of the thing condemned. A sale by the authority of the captors before sentence of condemnation, is affirmed by such sentence, and is good ab initio.

A French tribunal at Guadaloupe had jurisdiction of property seized on the high seas for breach of the Milan decree, and carried into the Dutch part of the island of St. Martins, and there sold by order of the Dutch governor of St. Martins, before condemnation, without any authority from the French tribunal at Guadaloupe. The American owner cannot reclaim, in the Courts of this country, his property which has been seized and condemned in a French court under the Milan decree.

February 25th.. Absent, TODD, *J.*

THIS was an appeal from the sentence of the Circuit Court for the district of Pennsylvania, which dismissed the libel with costs. |

The libel stated, that the schooner *Fortitude*, owned by Williams p. 424

and others, citizens of the United States, having taken in a cargo of molasses at Martinico, sailed on the 20th of August, 1809, for New London. That on the next day she was piratically seized on the high seas by an armed schooner, shewing no colours, but asserted to be from *Guadaloupe*, and carried into *St. Martin's*, where the captain's papers were taken from him, and the vessel and cargo detained, as it was asserted, to wait the event of a trial. That on the 9th of September, the prize-master left St. Martin's for Guadaloupe, with a copy of the schooner's papers, under pretence of causing proceedings to be instituted in the French Court of Admiralty in that island. That on the 23d of September, the master of the Fortitude went to *St. Bartholomews*, and on his return was informed, that during his absence the Governor had ordered the vessel and cargo to be sold at public sale; which was done and bought for the Governor and one of his council, as the Libellants believed. That immediately after the sale, the Governor took possession of the vessel, and on the 2d of October the cargo was landed, and 97 hogsheads of the molasses were shipped on board another vessel to Philadelphia, where they arrived, consigned to Armroyd and others, of whom the Libellants demanded it, but they refused to deliver it, or to account for the value of it.

A claim was interposed by George Armroyd & Co. in behalf of *Richardson & Carty*, and others, which stated, that on the 21st of August, 1809, and long before, war existed between Great Britain and France; that the Fortitude, being an American vessel at peace with the French empire, on her voyage from Martinico, a British colony, where she had been trading with the enemies of the French empire, during the war, in violation of the decrees and regulations of that empire, was seized by a French privateer, and carried to St. Martin's, as lawful prize to the captors; and her papers sent to a French tribunal, having competent jurisdiction, at Guadaloupe, under the sole and exclusive dominion and jurisdiction of the French empire; but the papers were captured on the passage to Guadaloupe. That the vessel and cargo, being so carried into
p. 425 St. Martin's, were there *bona fide* sold by order of the Dutch | governor at the island, to whom such right belonged, by the laws and constitutions of the said island; and the goods in question, part of the cargo, were *bona fide* purchased by a certain *I. L. Lapierre*, and by him *bona fide* sold to a certain *Abraham Concheyter*, from whom they were afterwards *bona fide* purchased by *Richards & Carty*, for account of themselves and others.

By consent of parties, a sentence was passed *pro forma* in the District Court, for the Libellants.

In the Circuit Court, upon the appeal, the Claimants exhibited a further answer, stating, that by a decree of the Registry of the Com-

mission for prize causes of the island of Guadaloupe, and its dependencies, duly constituted a Court of Prize by the Emperor of France, on the 12th of October, 1809, the schooner *Fortitude*, and her cargo, were condemned, by a sentence which is set forth at large in the answer; the substance of which sentence is included in the following extract, viz.

'It results from the examination and from the analysis of the papers 'just mentioned, that the schooner Fortitude, captured by the French 'privateer, *Le Fripon*, is the property of a citizen of the United States 'of America; that she sailed from New London, bound to Martinico, 'at which place she sold her cargo, and took in another of molasses for 'the said port of New London, and consequently she has incurred the 'penalty, pronounced by the 3d article of the Imperial decree, which 'directs new measures against the maritime system of England, and 'was given at the Royal Palace of *Milan*, on the 17th of *September*, '1807, inserted in the bulletin of the laws, No. 169, which article is as 'follows:

'Every vessel whatever, and whatever be her cargo, which shall 'have cleared from any English port, colony, or country occupied by 'English troops, or which shall be bound to any English port, colony 'or country occupied by English troops, shall be good prize, as having 'infringed the present decree. Such vessels shall be captured by our 'men of war, and awarded to the captors.' |

'And after having heard the opinion of the inspector of marine, we p. 426
'have declared, and do declare, the American schooner Fortitude to 'have been well and duly captured by the French privateer, *Le Fripon*, 'and to be forfeited to the owners and crew of the said privateer; con-'sequently the said schooner Fortitude, together with her cargo, is 'awarded to the captors to be sold in the customary form, if the sale 'has not already taken place; and the proceeds shall be distributed 'conformably to the ordinance concerning captures,' &c.

On the 19th of April, 1811, the Circuit Court reversed the sentence of the District Court, with costs; from which sentence of reversal, the Libellants appealed to this Court.

LYMAN LAW, *for the Appellants*.

This condemnation was founded upon the *Milan decree*, which is admitted, on its face, to be in violation of the law of nations. It does not proceed on the ground of its being the property of an enemy, nor contraband of war, nor for violating a blockade. If it appear from the sentence itself, that the condemnation was not upon any ground recognized by the law of nations, nor upon the violation of any municipal right acknowledged by that law, this Court will not carry it into effect. France may, by her own municipal laws, regulate her own trade, but she has no right to control ours, beyond her territorial jurisdiction, further

than to protect her own belligerent rights, acknowledged by the law of nations. If we violate no such right, and if we do not carry our property within her territorial jurisdiction, she has no right to regulate our trade. Her condemnation, grounded upon regulations which she has no right, according to the law of nations, to make, is void. But even if she had a right to condemn, her condemnation can transfer no title, unless the thing itself be in her possession, at the time of condemnation, so that the possession may pass with the title. Here the property never was within the jurisdiction of the Court at Guadaloupe. It had been sold and delivered by the Dutch governor, before the condemnation. It does not appear that he had any authority either from the captors,
p. 427 or from the Court, to make the sale. The purchaser | cannot derive from the governor a better title than the governor had at the time of sale.

I. R. INGERSOLL, *contra.*

It is acknowledged that a tribunal, professing to be a Court of Admiralty, has condemned the property in question, and that the Appellees possess it by virtue of a capture on the high seas. This is *prima facie* evidence of the correctness of the title, and throws the *onus probandi* upon the Appellants.

A Court of Admiralty is a Court whose jurisdiction is co-ordinate with that of every other throughout the world. The Admiralty law is '*of all times and of all nations*,' and its decrees, so far as they affect the thing itself, and so long as they remain unreversed, can never be questioned. The *end* being gained, it is an immaterial question, what were the *means*, as they are sanctified by the end. Whether the proceedings are erroneous, or not, according to our notions of right and wrong; whether they are predicated upon a mistake of the *law*, or of *the fact*, or are founded upon regulations consistent with, or repugnant to, the law of nations, are questions wholly immaterial. The sentence has sealed the proceedings, and those questions can never judicially come before this Court.

In confirmation of these positions, it might be sufficient to refer to the decisions of this Court, where the principles are settled.

In the case of *Rose v. Himely*, 4 *Cr.* 292, this Court refused to confirm the property of the alleged purchaser, because the Court, passing sentence, had neither the actual nor constructive jurisdiction, nor power, over the subject in controversy. The point upon which it was decided was, that the vessel and cargo were seized, out of the territorial jurisdiction claimed by the French government of St. Domingo, for a breach of municipal regulations, and were never carried within that jurisdiction, but were sold by the captor at a foreign port.

Two Judges, (the Chief Justice and Judge Washington) thought

that, in order to give jurisdiction, the property | should have been taken p. 428
as prize of war, and brought *infra præsidia*. Three (Judges Cushing, Chase and Livingston) were of opinion, that it would be conclusive even under a municipal regulation, provided it were carried to the country of the captors. Judge Johnson considered it conclusive at all events. But even in that case, the Chief Justice says, in p. 276, 'If the Court 'of St. Domingo had jurisdiction, the sentence is conclusive.' In the case of *Hudson and others v. Guestier*, and *La Font v. Bigelow*, 4 *Cr.* 293, it is decided that, in case of prize of war, a condemnation, while lying in a *neutral port*, will bind the property; and that the same principle applies to a seizure made within the territory of a state, for a violation of its *municipal laws*, p. 296. Judges Chase and Livingston dissented, because the vessel was not carried into a French port for trial. Judge Johnson adhered to his former opinion, that it was immaterial whether the capture was made in the exercise of *municipal* or *belligerent* rights, or whether within the jurisdictional limits of France, where she is supreme, or upon the high seas, where her authority is concurrent with that of other nations. P. 298.

In the case of *Croudson and others, v. Leonard*, 4 *Cr.* 434, it was decided, that a sentence of condemnation for breach of blockade, was conclusive evidence of a violation of the warranty of neutrality in a policy of insurance.

In the case of Rose & Himely, above mentioned, the incidental questions were decided in favor of our positions; for here it was *prize of war*, seized and condemned within the jurisdiction of the Court; yet it may be said the issue of that case was adverse. If so, it was expressly over-ruled in *Hudson & Smith, v. Guestier*, 6 *Cr.* 281. The Court there unanimously decided, that the judge of the French Court must have had a right to dispose of every question made in behalf of the owner of the property, whether it related to the jurisdiction of the Court, or arose out of the law of nations, or out of the French decrees, or in any other way: and even if the reasons of his judgment should not be satisfactory, it would be no ground for a foreign Court to rescind his proceedings, and to refuse to consider his sentence as conclusive on the property; and that, as the title was changed by the condemnation at Guadaloupe, the original | owner had no right to pursue it in the hands p. 429
of a vendee.

But this is no new principle of law originating with the present state of the world, which would seem rather to forbid it; since the rapacity of Courts of admiralty on the one side, and their acknowledged subserviency to the governing power on the other, diminish the respect which would otherwise be due to their sentences.

The conclusive effect of a foreign sentence in changing the property

seems to have been first judicially decided in the case of *Hughes v. Cornelius*, 2 *Shower*, 242. *Sir T. Raymond*, 473. *Skin.* 59. *Lord Raym.* 893. 935. *Vern.* 21. The authority of this case has never been questioned. The only question has been as to the collateral effect between underwriters and the assured in cases of warranty in a policy of insurance. And even there, whenever the condemnation has been upon the ground of its being the property of an enemy, the sentence has always been holden to be conclusive, without regard to the circumstances by which the Court came to that result. The sentence is conclusive as to whatever it purports to decide. *Park.* 355. 360, 361–2, *Rob.* 173, *The Christopher.* 4 *Rob.* 35, *The Henrick and Maria.* 5 *Rob.* 255, *The Comet.* 4 *Rob.* 3, *The Helena.* 3 *Bos. & Pul.* 505, *Lothian v. Henderson*, 7 *T. R.* 526, *Calvert v. Boville*, 7 *T. R.* 681, *Geyer v. Aguilar. East* 473, *Oddy v. Boville.* 3 *Bos. & Pul.* 201, *Baring v. Clagett.* 5 *East*, 99, *Baring v. Royal Exch. Ins. Co.* 5 *East*, 155, *Bolton v. Gladstone.* Such also has been the course of decisions in the different American States. 1 *Binney*, 295, *Calhoun v. Penn. In. Co.* 3 *Binney*, 220, *Cheviot v. Faussat.* 2 *Johnson's N. Y. cases*, 451, *Vanderheuvel v. The United In. Co. S. C.* 127.

Such being the acknowledged effect of a foreign condemnation, the only remedy for the injured party is a resort to the Court of the captors for redress. If that government will not afford it, he must apply to his own, which will make it a national concern to be settled either by negotiation or war, if it be deemed a matter of sufficient importance. *Doug.* 614, *Le Caux v. Eden.*

The fact that the *Milan decree* was a violation of the law of nations, and of our neutral rights, can make no difference. For if an unjust
p. 430 condemnation, professing | to be founded upon a just law, be conclusive, there is no reason why a condemnation, founded upon an unjust law, should not be equally conclusive.

The question is not, whether this Court will lend its aid to carry into effect the Milan decree, but whether it will reverse the sentence of a foreign Court, and destroy vested rights acquired under such a sentence by a *bona fide* purchaser.

But it is said the purchase was made before the sentence of condemnation was passed, and was therefore void. This, however, can make no difference. The effect of the condemnation is not to vest the property, but to sanctify a title which was vested by the capture ; to confirm all intermediate acts, and to give a judicial sanction to that which was already sufficiently firm in point of fact. 1 *Wils.* 211. 2 *Azuni*, 262. 12 *Mod.* 134, *Rex v. Broome. Carth.* 398. *S. C.* The condemnation does not give property, it only establishes the fact that the captor had a lawful title by the capture. These maritime sales in market overt give

an indefeasible title. 4 *Johnson*, 38, 39, *Grant v. M'Lachlan.* In cases of foreign attachment, if the attached goods are perishable, or from their situation are exposed to peculiar danger, the constant practice is to order a sale, and such sales are valid, although the attaching creditor may fail to support his claim.

It is an established principle, says the Court of errors, (2 *Johnson's cases*, 458,) that any person purchasing will be secure.

LAW, *in reply*, cited the cases of *Geyer v. Aguilar, Pollard v. Bell, Price v. Bell, Bird v. Appleton, Mayne v. Walter.* 1 *Rob.* 144, *and Havelock v. Rockwood*, 8 *T. R.* 268, to show that there must be a good cause for condemnation by the law of nations. He cited also, 4 *Cr.* 221. *Doug.* 574, and 1 *Rob.* 139, to the same point, and to show the limitation of the general principle of conclusiveness of a foreign sentence. As to the extent of the power of France over neutral commerce, he cited *Marten's Law of Nations*, 332; and to show that the Berlin and Milan decrees were in violation of our neutral rights, and were so declared by our government, he referred to the *President's message to Congress* of the | 15*th of December*, 1810, and cited 4 *Cr.* 292, *Rose v. Himely.* 3 *Rob.* 99, 333, p 431
2 *Rob.* 239.

To show that the Court must have jurisdiction, before its decree can be conclusive, he cited 4 *Cr.* 471. 3 *Rob.* 96. To support the position that a sale before condemnation is not valid, he cited *Marten's* 332. 4 *Cr.* 250. 1 *Browne's civil law*, 254. 1 *Rob.* 139.

DANA, *on the same side.*

This is an appeal by a citizen of the United States to his government for redress for a violation of his neutral rights by a foreign sovereign. This Court exercises that branch of the government, which, in some countries of Europe, is exercised by the sovereign himself. The only question is, whether this Court has power to declare void a condemnation founded upon a decree which the legislature and the executive of the United States have declared to be a violation of our neutral rights, and contrary to the law of nations. This is a question never before agitated in the Courts of the United States.

This vessel has not violated the law of nations, nor the municipal law of any state or nation.

The sovereign power of a nation cannot be exercised on the high seas, unless over its own subjects or pirates, or *jure belli.* It can affect *hostile* property only. A municipal regulation can not rightfully affect neutral property, beyond the territorial jurisdiction. On the high seas all nations are equal. This property, having never been within the French jurisdiction, can never have offended against French municipal law. The Court had no jurisdiction under the municipal law of France

in such a case. Suppose, in case of capture and recapture, the first captors proceed to libel and condemn the property in a French Court, while it is safe in a port of the United States, having never been within the jurisdiction of France. It can never be pretended that such a condemnation would be valid.

The title and possession must be delivered together at the same time, or the sentence will not be conclusive *in rem.* |

p. 432 In the cases of *Rose & Himely*, and *Hudson & Guestier*, the property was sold *by an agent of the Court ;* but the Dutch governor of St. Martin's, had no authority from the tribunal at Guadaloupe. It has been decided in the Courts of the United States, that Holland is not a dependency of France. Captors cannot sell or dispose of the property captured, before the capture has been adjudged lawful by a competent Court. It is the interest of all nations to enforce this rule. The opposite practice would lead to incalculable evils.

*March 8th...*MARSHALL, *Chief Justice*, delivered the opinion of the Court as follows :

A vessel, with a cargo belonging in part to the Appellants, was captured on the high seas, on the 20th of August, 1809, by a French privateer, and carried to St. Martins, where the vessel and cargo were sold, by order of the governor, at public auction, and part of the cargo purchased and sent to the Appellees in Philadelphia. After the sale the vessel and cargo were condemned by the Court of prize, sitting at Guadaloupe, professedly for a violation of the *Milan decree* in trading to a dependence of England. On the arrival of the goods, they were claimed by the original owner, who filed a libel for them. In the District Court they were adjudged to him. The Circuit Court reversed that sentence, and from the judgment of the Circuit Court there is an appeal to this Court.

It appears to be settled in this country, that the sentence of a competent Court, proceeding *in rem*, is conclusive with respect to the thing itself, and operates as an absolute change of the property. By such sentence, the right of the former owner is lost, and a complete title given to the person who claims under the decree. No Court of co-ordinate jurisdiction can examine the sentence. The question, therefore, respecting its conformity to general or municipal law, can never arise, for no co-ordinate tribunal is capable of making the inquiry. The decision, in the case of *Hudson & Smith, v. Guestier*, reported in 6th Cranch, is considered as fully establishing this principle.

It is contended that the sentence, in this case, has not changed the property, because |

p. 433 1st. The sale was made under the direction of the governor of St. Martins, before the sentence of condemnation was pronounced.

2d. The sentence proves its own illegality, because it purports to be made under a decree which the government of the United States has declared to be subversive of neutral rights and national law.

1st. In support of the first objection, it has been urged, that the jurisdiction of the Court depends on the possession of the *thing;* that a sentence is a formal decision, by which a forcible possession is converted into a civil right; and that the possession being gone, there remains nothing on which the sentence can operate.

However just this reasoning may be when applied to a case, in which the possession of the captor has been divested by an adversary force; as in the cases of recapture, rescue, or escape; its correctness is not admitted when applied to this case. The possession is not an adversary possession, but the possession of a person claiming under the captor. The sale was made on the application of the captor, and the possession of the vendee is a continuance of his possession.

The capture is made by and for the government; and the condemnation relates back to the capture, and affirms its legality.

2d. That the sentence is avowedly made under a decree subversive of the law of nations, will not help the Appellant's case, in a Court which cannot revise, correct, or even examine that sentence. If an erroneous judgment binds the property on which it acts, it will not bind that property the less because its error is apparent. Of that error, advantage can be taken only in a Court which is capable of correcting it.

It is true that in this case there is the less difficulty in saying, that the edict under which this sentence was pronounced, is a direct and flagrant violation of national law, because the declaration has already been made by the legislature of the Union. But what consequences attend this legislative declaration? Unquestionably the | legislature p. 434
which was competent to make it, was also competent to limit its operation, or to give it effect by the employment of such means as its own wisdom should suggest. Had one of these been, that all sentences pronounced under it should be considered as void, and incapable of changing the property they professed to condemn, this Court could not have hesitated to recognize the title of the original owner in this case. But the legislature has not chosen to declare sentences of condemnation, pronounced under this unjustifiable decree, absolutely void. It has not interfered with them. They retain therefore the obligation common to all sentences whether erroneous or otherwise, and bind the property which is their object; whatever opinion other co-ordinate tribunals may entertain of their own propriety, or of the laws under which they were rendered.

The sentence is affirmed with costs.

Livingston and Gilchrist v. The Maryland Insurance Company.

(7 Cranch, 506) 1813.

To constitute a representation, (in making insurance) there should be an affirmation or denial of some fact; or an allegation which would plainly lead the mind to the same conclusion. If by the usage of the trade insured, it be necessary that certain papers should be on board, the concealment of those papers cannot affect the Plaintiff's right to recover upon the policy. In general, concealment of papers amounts to a breach of warranty. A Spanish subject who came to the United States in a time of peace between Spain and Great Britain, to carry on a trade between this country and the Spanish provinces, under a royal Spanish license, and who continues to reside here and carry on that trade, after the breaking out of war between Great Britain and Spain, is to be considered as an American merchant, although the trade could be lawfully carried on by a Spanish subject only. If the letter submitted to the underwriters, ordering the insurance, refer to another letter previously laid before them, which letter contained information that the vessel had permission to trade to the Spanish colonies, the underwriters are bound to notice that fact and to know that the vessel would take all the papers necessary to make the voyage legal. The usage of trade may be proved by parol, although such usage originated in a law or edict of the government of the country. The question whether the abandonment were made in due time, is not a question of fact to be exclusively left to the jury, but to be decided by them under the direction of the Court. No acts, justifiable by the usage of the trade, & done by the Plaintiffs to avoid confiscation under the laws of Spain, can avoid the policy. If the Plaintiffs do any act which increases the risk of capture and detention according to the common practice of the belligerent, it may avoid the policy. It is not necessary that the risk thus increased, should be the risk of rightful capture according to the law of nations.

February 9th. Absent...LIVINGSTON, *J. and* TODD, *J.*

ERROR to the Circuit Court for the district of Maryland, in an action
p. 507 of covenant upon a policy of insurance | (against capture only) upon the cargo of the ship *Herkimer*, ' from *Guayaquil*, or her last port of departure in South America, to New-York,' ' *warranted American property, proof of which to be required in the United States only*,' ' and *warranted free from seizure for illicit trade.*' The declaration was on a loss by capture.

The case was stated as follows by MARSHALL, *Chief Justice*, in delivering the opinion of the Court:

Julian Hernandez Baruso, a Spanish subject, having obtained from the crown of Spain a license to import from Boston into the Spanish provinces of Peru and Buenos Ayres, in South America, in foreign vessels, a certain quantity of goods in the license mentioned, and to take back the proceeds in produce on payment of half duties, came to New York, in September, 1803, (Spain being then at peace with Great Britain,) for the purpose of carrying on trade under his said license.

On the 24th of August, 1804, he entered into a contract with a certain Anthony Carroll, for the transportation of a certain quantity

of goods to Lima, in Peru, under the said license. Carroll died without carrying the contract into full effect.

On the 25th of January, 1805, war having then broke out between Great Britain and Spain, B. Livingston, who had been bound as Carroll's surety for the performance of the contract, entered into a new contract with Baruso for the transportation of the same goods.

The preamble recites the license, and says, The said Baruso has agreed with the said B. Livingston to make an adventure to Lima, on the conditions and stipulations following, to wit :

1. In consideration, &c. he agrees to the following *partnership* with the said B. L. in virtue of which he transfers to the said *firm*, all his powers, &c. (under the license) of sending an American vessel belonging to the said L. or chartered, in which vessel shall be embarked goods to the amount of 50,000 dollars, the funds and vessel to be furnished and advanced by said L. |

2. Baruso to obtain the necessary papers from the Spanish consul, p. 508
and B. L. to pay the duties. Baruso answerable for detention or confiscation by the Spanish government or vessels on account of any defect of right to send under said license, &c.

3. L. agrees in four months to embark the goods on board a vessel to Lima, to proceed thither, and to return to the United States with a cargo.

4. L. to choose the supercargo and instruct him ; and as the adventure will appear on the face of the papers to belong to B. he shall give the supercargo a power, and recognize him the master of the cargo, so that the consignees at Lima shall follow literally his orders. The consignees, who were partners of B., to receive a commission.

6. The said L. and B. agree to divide equally, and part and part alike, the profits of the adventure. L. to have commissions on sale.

7. Optional in L. to sell in United States, or convey the return cargo to Europe. If he sells in the United States, B. may take out, at the price of sales, as much as will be equal to his rights.

8. If L. sends the cargo to Europe, he is to choose the supercargo, but the consignees to be chosen jointly.

9. In case of loss B. to claim nothing, as his share in the profits only accrues on the safe return of the vessel to the United States. Optional with L. to insure or not. L. not to be allowed for risk, if no insurance, more than 15 per cent. No insurance to be on the risks of the Spanish government.

12. If any loss accrues from causes not stipulated, B. to lose only his privilege. If loss on sale of return cargo, B. to sustain half.

Livingston soon afterwards chartered the ship Herkimer for the voyage, and entered into a contract with the other Plaintiff Gilchrist, one James Baxter, and Edward Griswold, for jointly carrying on, with them, | the p. 509

said voyage. The cargo was purchased with their joint funds, and was shipped to Lima, where, and at Guayaquil, a return cargo was received, purchased with the proceeds of the original cargo.

On the 25th of March, 1806, Mr. Gilchrist addressed to Alexander Webster & Co. at Baltimore, a letter containing an order for insurance on the cargo of the ship Herkimer, from Guayaquil, or her last port of departure in South America, to New-York, against loss by capture only, warranted American property, and free from all loss on account of seizure for illicit or prohibited trade. It says, 'the owners are already insured 'against the dangers of the seas and all other risks, except that of capture.' 'You have already had a description of the ship from Messrs. Church and 'Demmill, the agent of Mr. Jackson, and which I presume is correct.' 'I think proper to mention that the insurance will be on account of 'Mr. Brockholst Livingston and myself. Mr. Baxter and Mr. Griswold 'are also concerned, but the first gentleman thinks there is so little danger 'of capture, that in his letter from Lima he expressly directs no insurance 'to be made for him against this risk, and Mr. Griswold is not here to 'consult. Both these gentlemen, as well as those for whom you are 'desired to make insurance, are native Americans.'

The letter of Church and Demmill was dated 13th Feb. 1806, and after describing the ship, adds, 'she sailed from Boston the 12th of May 'last for Lima, with liberty to go to one other port in South America, 'not west of Guayaquil, and from thence to New York. *She has per-* '*mission to trade there.*'

This letter was laid before the board of directors, and the application at that time rejected.

The letter from Gilchrist to Webster and Co. was afterwards laid before the board, and the company made the insurance for the Plaintiffs at 10 per cent.

The Herkimer, on her return voyage, was captured near the port of New York, by the *Leander*, a British ship of war, and sent to Halifax, where she was condemned. |

p. 510 The Plaintiffs gave the underwriters notice of the capture, and obtained their permission to prosecute a claim for restoration without prejudice to their right to abandon. On receiving notice of the condemnation, they wrote a letter of abandonment, which was delivered to the underwriters, who refused to pay for the loss, whereupon this suit was brought.

On the return voyage, just after doubling Cape Horn, Baxter, who was supercargo and part owner, gave to Edward Giles, the third mate, a bundle of papers, partly in Spanish, telling him at the same time that in all probability they might fall in with privateers, who might overhaul the trunk in the cabin, and if they found the papers, it was probable the

vessel might be detained as the papers were in Spanish, and they might not be able to translate them. Giles put the papers in his trunk.

After the capture, Giles was taken out of the Herkimer into the Leander, and on being asked if he had any objection to have his trunk searched, replied that he had not. The trunk was then searched, and this bundle discovered. It contained papers, covering the cargo as the property of Baruso, mixed with others which showed that in fact it was the property of the Plaintiffs and of Baxter and Griswold. Evidence was given to prove, that the usage of the trade made these papers necessary. There was also an estimate of the probable value of the cargo, if shipped to Europe.

The Herkimer arrived before the Leander; and Baxter, upon his examination on the standing interrogatories, described truly the character of the voyage, and stated correctly the property in the cargo, but denied his knowledge of any papers, other than those which were exhibited, as belonging to the ship.

Issue was joined on the plea, that the Defendants had not broken their covenant, and the jury found a verdict in their favor.

On the trial, 28 bills of exception were taken, partly by the Plaintiffs, and partly by the Defendants. Only those taken by the Plaintiffs are now before the Court. |

The Plaintiffs prayed the Court below to instruct the jury, that the p. 511
letter, ordering the insurance, does not contain a representation that no person, other than the said Livingston, Gilchrist, Griswold & Baxter, was interested in the return cargo of the Herkimer; nor that all the persons interested therein were native Americans. The judges were divided on this point, and the instruction was not given.

The 5th bill of exceptions stated, that the Plaintiffs prayed the Court to instruct the jury, that if they believed the testimony offered by them, then there was no such concealment of the said papers as can affect the right of the Plaintiffs to recover in this action, which instruction the Court refused to give, but directed the jury that if they should be of opinion, that from the usage and course of trade it was necessary to have the Spanish and other papers delivered by Baxter to Giles, the 3d mate, as aforesaid, then the delivery by Baxter to Giles, and the finding and taking of the said papers by the officers of the Leander, was not such a concealment as affects the right of the Plaintiffs to recover.

The 6th bill of exceptions states, that the Plaintiffs then prayed the Court to instruct the jury, that Baruso having removed to New York, in the United States, while Spain was neutral, for the purpose of carrying on trade, and having continued to reside in New York until after the capture of the Herkimer, the said Baruso could not, at the time of the voyage, be considered as a belligerent. This instruction the Court also

refused to give, but did instruct the jury that if they should be of opinion that the said Baruso settled in New York before the war between Spain and Great Britain, and remained there domiciliated and carrying on trade generally until the capture of the Herkimer, he is to be considered as a neutral; but if they should be satisfied from the testimony that he went to New York for no other purpose but to carry on trade as a Spanish subject, which he could not engage in as a neutral, and that he was not engaged in any other trade than as a Spanish subject, he cannot be considered as a neutral.

The 7th bill of exceptions states, that the Court then, on the prayer of the Defendants, gave to the jury the following opinion: |

p. 512 'The Court having already given an opinion, that Baruso was not 'a joint owner with the Plaintiffs and Griswold and Baxter, in the return 'cargo of the Herkimer, do, in compliance with the opinion of the Supreme 'Court, leave it to the jury to determine, whether Baruso had an interest 'in the return cargo which increased the risk of the said voyage, and 'if the risk was increased, that the policy was thereby vitiated.' This opinion was given on the prayer of the Defendants to instruct the jury, that the non-communication to the underwriters of papers showing Baruso to have an interest, and to be a Spanish subject, vitiated the policy.

The 8th bill of exceptions stated, that the Defendants then prayed the Court to instruct the jury, that if they should be of opinion that the papers which were delivered to Giles by Baxter, or any of them, increased the risk, and that if any of the papers which did so increase the risk were not necessary by the laws and usages of Spain, or the course and usage of trade between the United States and Lima, and that it was not communicated to the Defendants that such papers would accompany the cargo, then the Plaintiffs were not entitled to recover. The Court gave the opinion.

The 9th bill of exceptions stated, that the Plaintiffs prayed an instruction to the jury, that in estimating the increase of risk on the return voyage of the Herkimer, they were to consider it as a voyage which the Defendants were informed, in and by the letter of Church and Demmill, was carried on under a license from the Spanish government; and the question for them to decide was, whether the risk of such a voyage, carried on under such a license, was increased by any of the circumstances relied on by the Defendants to show an increase of risk in this case. This opinion the Court refused to give.

The 11th bill of exceptions stated, that the Plaintiffs produced a witness to prove the usage of the trade, who said that by the laws, regulations and usages of the trade, it was necessary that the property imported into, or exported from the colony, by a foreigner, should be under

p. 513 a Spanish license, and appear to be Spanish | property. Whereupon the

Defendants moved the Court to instruct the jury, that this evidence is not competent to prove the municipal laws of Spain, or the usage and custom of trade established by their municipal laws. The opinion of the Court was, that 'no parol evidence is admissible to the jury, or if given, can be regarded by them, to prove the legislative edicts or acts of the Spanish government, or to prove any usage, custom or course of trade conformable to such edicts or acts; but that such evidence is admissible to prove the general usage and course of trade that may depend on instructions to the government of Peru.'

The 13th bill of exceptions stated, that the Plaintiffs produced witnesses, ignorant of the laws of Spain, to prove their understanding of the usage of the trade; and the Defendants produced counter testimony on the usage; whereupon the Defendants moved the Court to instruct the jury, that the testimony of the Plaintiffs, if believed, was not competent to show the usage or course of trade that the Herkimer, on her return voyage, should be accompanied with papers giving the cargo the appearance of Spanish property. The Court refused to give this opinion, but instructed the jury, that if they were of opinion that the usage or course of trade from or to the province of Peru by foreigners, was to have a license from the king of Spain to trade, and to have Spanish papers on board, to show or give color that the cargo was Spanish property, the Defendants were bound to take notice of such course of trade; but if the jury should be of opinion that the trade was prohibited by the laws of Spain, the Plaintiffs must prove that the Defendants had notice or information of such prohibition.

The 20th bill of exceptions is to an opinion of the Court, that whether the abandonment was in reasonable time or not, is not a fact to be exclusively left to the jury, but to be decided by them under the direction of the Court.

The 24th bill of exceptions stated, that the Defendants moved the Court to instruct the jury, that the insurers are not liable for any increase of risk, in consequence of any acts done by the insured to avoid seizure | and confiscation under the laws and regulations of the Spanish p. 514
government, which instruction the Court gave.

The 25th bill of exceptions stated, that the counsel for the Plaintiffs then moved the Court to instruct the jury, that the right of the Plaintiffs would not be affected by any increase of risk produced by such acts as were stated in the preceding exception, if such acts were according to the course and usage of trade on the voyage insured. This opinion the Court refused to give.

The 28th bill of exceptions stated, that the Plaintiffs moved the Court to instruct the jury, that the increase of risk, by which alone the right of the Plaintiffs to recover in this action can be effected, is

an increase (by reason of some act or omission of the Plaintiffs, or their agents) of the danger of *rightful* capture or condemnation under the law of nations. The Court refused to give this opinion.

The verdict and judgment being against the Plaintiffs they sued out their writ of error.

HARPER, *for the Plaintiffs in error.*

1. The 1st question is that upon which the Court below was divided in opinion, viz: whether the letter of Gilchrist to Webster & Co. ordering the insurance, contains a representation that no other person than Livingston, Gilchrist, Griswold and Baxter was interested in the return cargo of the Herkimer, or that all the persons interested therein were native Americans. It certainly does not contain a direct affirmation of either of those facts. It contains at most a negative pregnant; an ambiguity of which the underwriters, if they deemed it important, should have required an explanation. Nothing can amount to a representation which is not certain to a common intent; so certain as not to admit of a doubt, provided the veracity of the party be not questioned, and he be not under a mistake. There is no difference between a representation and a warranty, except that the one is contained in the policy and the other is out of it. They must both be equally certain.

STORY, *J.* Do you admit this question to be relevant to the cause? |
p. 515 HARPER. No. That is another branch of the argument, I shall contend that it was immaterial whether Baruso were a neutral or not; but that he was, *quoad hoc* neutral.

2. The 2d question arises upon the 5th bill of exceptions, which was the first taken by the Plaintiffs. It is to the refusal of the Court to instruct the jury that there was no such concealment of papers as could affect the Plaintiff's right to recover; and to the opinion which the Court gave, whereby they made the effect of the concealment depend upon the question whether the papers were *necessary* according to the usage and course of the trade. The Plaintiffs object to the opinion given.

1. Because it makes the effect of Baxter's conduct relative to the papers depend on the usage and course of the trade; whereas, independently of any such usage, that conduct could not affect the right of recovery; inasmuch as it did not amount to a concealment of papers; and as the concealment of papers cannot affect such a right.

2. Because it requires that the usage and course of the trade; in order to make this conduct of Baxter innocent, should render it *necessary* to have those papers on board, whereas if the usage and course of trade PERMITTED the having them, it was sufficient.

3. Because it extends to *all* the papers delivered by Baxter to Giles; many of which were perfectly immaterial and innocent in themselves, independently of any usage or course of trade.

The act did not amount to a concealment. It was only putting the papers from one trunk to another less liable to be searched. It must be such an act as would be likely to prevent discovery; and it must be done with intent to deceive the belligerent, and to defraud him of some belligerent right. When the prayer for an instruction is hypothetical, the facts constituting the hypothesis are to be considered as found by special verdict. If these facts had been found by a special verdict, they would not have been a finding of a concealment. But concealment of papers is not a violation of neutrality. It is no ground for condemnation, nor even | for detention. The answer to the Russian memorial p. 516
expressly disclaims *concealment* and even *destruction* of papers as a legal ground of condemnation. It is only a ground to refuse costs or damages on restitution; or to refuse further proof, where there is *prima facie* ground of condemnation independent of the concealment—1, *Rob. append.* 5, *answer to the Russian memorial*, 2, *Rob.* 88—*the Rising Sun.* Even spoliation of papers would affect *Baxter's* property only; and the Plaintiffs would be permitted to give further proof.

Some of the papers delivered to Giles were wholly unimportant, and unnecessary to the prosecution of the voyage in safety, and yet the opinion of the Court, (to be in favor of the Plaintiffs) required that they should be necessary according to the usage and course of the trade. Among those papers was an estimate of the value of the cargo if reshipped from New York to Cadiz. This certainly was not necessary by the usage of the trade. There were several other papers equally unimportant. Yet in the opinion of the Court the concealment of these papers violated the warranty of neutrality.

3, The 3d question arose on the 6th bill of exceptions which was to the opinion of the Court which made Baruso's character, as a neutral or belligerent, depend upon the kind of trade he carried on, as well as upon his domicil.

The Plaintiffs object to this opinion, 1st. Because the place of domicil acquired in time of peace is the criterion of a man's character as neutral or belligerent, and not the nature of the trade. In the case of the *Harmony*, 2, *Rob.* 266, G. W. Murray residing in France, was considered as a belligerent, while his partners *in the same adventure*, residing in the United States were considered as neutrals. 3, *Rob.* 21, *the Indian Chief.* 3, *Rob.* 37, *the Citto.*—1, *Rob.* 323, *standing interrogatories.* 12*th interrogatory as to residence of the parties.*—5, *Rob. Appendix*, order in council of the 24th of June, 1803, relating to *inhabitants* of certain colonies. 8, *T. R.* 31, *Wilson v. Marryat*, 1, *Caine's cases in error*, 25, *Duguet v. Rhinelander.* The nature of the trade has nothing to do with the question. If neutral by domicil he may trade with belligerents, provided | it be not in articles contraband of war. His neutrality was not incon- p. 517

sistent with his privilege as a Spanish subject. He does not lose his privilege by becoming a neutral American. As between him and the government of Spain, he was still a Spanish subject. But as between him and the government of Great Britain, he was, according to the principles of the British prize Courts, an American merchant.

The Plaintiffs also object to the opinion of the Court because there was no evidence upon which the Court could ground the hypothesis, that Baruso came to this country to carry on that trade *only*. Although the fact might be that he carried on no other trade yet it does not follow that he came here for no other purpose.

4. The 4th question arises under the 7th bill of exceptions, which states that the Court (in compliance with the opinion of the Supreme Court [1]) left it to the jury to determine whether Baruso had an interest in the return cargo which increased the risk of the voyage ; and directed the jury that if the risk was increased, the policy was thereby vacated.

The Plaintiffs object to this opinion of the Court,

1. Because it leaves it to the jury to decide a mere question of law, viz : whether the contingent interest of Baruso in the voyage, could have the effect of defeating the Plaintiffs right to recover, by increasing the risk ; instead of directing them, as ought to have been done, that such an interest was not subject to capture ; that the Plaintiffs were not bound to disclose it ; and that therefore it could not in law affect their right to recover.

2. Because it does not, as it ought to have done, make the effect of Baruso's interest on the right of recovery, depend on his national character ; it being clear, as the Plaintiffs contend, that if he was a neutral, and not a belligerent, his property was not liable to capture, and no interest which he had in the voyage could affect their right. |

p. 518 3. Because it does not, as it ought to have done, make the effect of this interest on the right of recovery, depend on the usage and course of the trade ; it being clear as they contend, that if the usage and course of the trade authorized the use of a Spaniard's name to cover the voyage, a mere contingent interest of that Spaniard in the voyage could not, nor could any interest which he could have in it *consistently with the warranty*, affect the right of the Plaintiffs.

4. Because the Defendants, having protected themselves, by a warranty of neutrality, against the effect of any belligerent interest in the voyage, were not entitled to a disclosure of that of Baruso, even could it be considered as a belligerent interest.

The Court below misunderstood the opinion of this Court upon every point on which an opinion was given when this cause was before this Court on the former writ of error, (6 *Cranch, p.* 274.)

[1] See 6 *Cranch*, p. 274.

Whether Baruso had an interest in the return cargo was a question of law dependent upon the construction of this contract.

The opinion of this Court was that if Baruso had an interest in the return cargo, the materiality of that interest to the risk of the voyage, was a fact to be decided by a jury under the direction of a Court. This Court did not decide that the question whether Baruso had such an interest, was to be left to the jury. The Court below ought to have directed the jury that Baruso had no interest. He was not to share the loss unless that loss happened by a defect in his license. He was only to share in the profits after the vessel should arrive. It was only a contingent interest in the success of the voyage, like the interest of a consignee who is to have a commission on the sales. Suppose a consignee in a neutral country should be a subject of a belligerent nation, would his contingent interest vitiate the policy? It would afford no *just* ground of interference by a belligerent. The question is not what would furnish a just pretext for rapacity, but what would be a just ground of detention under the law of nations. 1, *Caine's Ca.* | *in error*, p. 519
25, *Duguet v. Rhinelander.* 9, *East*, 282, *Baker v. Blakes.*

The Court below ought to have told the jury that Baruso, being domiciliated in the United States, was to be considered as a neutral, and as such, his property was safe under the law of nations, whatever pretext his name might have afforded to a rapacious cruizer.

The connexion of a belligerent interest with a neutral interest, does not render void a policy on the neutral interest.

Besides the course of the trade made it necessary that the property should be in the name of Baruso, and this was known to the underwriters.

But, with submission to any opinion which this Court may have given, the interest of Baruso was wholly immaterial to this case. The Defendants have guarded themselves by the warranty of neutrality. If the property be neutral their mouths are stopped. When they take a warranty, they wave all questions of this kind. The premium was calculated upon the warranty. When a contract is reduced to writing all antecedent negotiations are merged in the conclusive act. The Plaintiffs were not bound to give notice of any belligerent interest. As to every thing against which the warranty is a protection, no disclosure was necessary.—*Marshall*, 475. If Baruso's interest did not violate the warranty it was immaterial.

5. The 5th question arose upon the 8th bill of exceptions which was taken to the opinion of the Court, 'that if the jury should be of 'opinion that the papers which were delivered by Giles to Baxter, or 'any of them, increased the risk, and that if any of the papers which 'did so increase the risk were not necessary by the laws and usages of 'Spain, or the course and usage of trade between the United States and

'Lima, and that it was not communicated to the Defendants that such 'papers would accompany the cargo, then the Plaintiffs were not entitled 'to recover.'

To this opinion the Plaintiffs object, |

p. 520 1. Because it requires that those papers, in order to be considered as innocent, should be *necessary* by the usage and course of the trade; whereas it was sufficient if the usage *authorized* them, although it might not have rendered them necessary.

2. Because the Defendants having protected themselves by a warranty of neutrality against unneutral conduct, were not entitled to a disclosure of the fact that those papers would be on board.

The effect of the Spanish papers was neutralized by the real American documents on board, showing clearly the real state of the interest of the Plaintiffs. If the Spanish papers had stood alone they might have been a ground of detention, or perhaps of further proof; but they of themselves showed a neutral character, though not the same ownership. They showed the property to belong to Baruso, and that he was a resident of Boston. But the papers which accompanied them in the same bundle, showed the real ownership and clear neutrality of the cargo. The Spanish papers, therefore, did not prove the property to be belligerent; and if they did not falsify the warranty, they were perfectly immaterial.

6. The 6th question was upon the 9th bill of exceptions, which was taken to the refusal of the Court to instruct the jury that in estimating the risk they were to take into consideration the circumstance that it was a voyage which the Defendants were informed was carried on under a license from the Spanish government. It is clear that the connexion of Baruso with such a voyage could not increase the risk.

7. The 7th question was upon the 11th bill of exceptions, which was taken to the opinion of the Court that parol evidence was not admissible to prove any usage, custom, or course of trade, conformable to the legislative edicts or acts of the Spanish government. But that such evidence was admissible to prove the general usage or course of trade that might depend upon *instructions* to the government of Peru.

The Plaintiffs object to this opinion because it precluded them from
p. 521 parol proof of the usage and course | of trade, in case that usage and course should have arisen out of, or even should happen to be in conformity with the legislative acts or edicts of Spain. Whereas the usage and course of trade are in all cases facts capable of parol proof, and seldom susceptible of any other.

8. The 8th question arose upon the 13th bill of exceptions, which was taken to the opinion of the Court that the Defendants were bound to take notice of the usage and course of trade, but not of the *laws* of Spain prohibiting the trade.

To the latter part of this opinion the Plaintiffs object,

1. Because, whether the trade was generally prohibited by the laws of Spain, or not, was a matter wholly immaterial; and their right of recovery ought not to depend on the knowledge which the Defendants might or might not possess of an immaterial fact.

2. Because if the prohibition of this trade by the laws of Spain was legally proved, and was a material fact, the Defendants were bound to take notice of it.

3. Because there was no legal evidence given in the cause, or stated in any of the bills of exceptions, that this trade was generally prohibited by the laws of Spain; the only evidence being that it could not, according to the usage and course of the trade, be carried on to a foreign port, except under a special permission, a Spanish name, and Spanish papers. Therefore it ought not to have been left to the jury to find that this trade was prohibited by the laws of Spain, as a foundation for requiring the Plaintiffs to prove that the Defendants had notice of the prohibition.

9. The 9th question was on the 20th bill of exceptions, which was taken to the opinion of the Court, that the question whether the abandonment was or was not in reasonable time, was not a question of fact to be exclusively decided by the jury, but was to be decided by them under the direction of the Court. The Plaintiffs contend that under the opinion of this Court in this case upon the former writ of error (6 *Cranch, p.* 274) | it is a mere question of fact to be found by the jury. But as p. 522
some doubt arose in consequence of what was said by this Court in the case of the *Chesapeake In. Co. v. Starke*, (6 *Cranch, p.* 268) this bill of exceptions was taken that the opinion of this Court may be fully understood.

MARSHALL, *Ch. J.* said he understood that the Court might instruct the jury that certain facts constitute reasonable notice; but that in a special verdict it must be stated whether the time was reasonable.

HARPER.

10. The 10th question arises upon the 24th and 25th bills of exception. In which the Court instructed the jury in substance that the insurers were not liable for any increase of risk in consequence of any acts done by the insured to avoid seizure and confiscation under the laws and regulations of the Spanish government; although such acts were according to the usage and course of the trade on the voyage insured.

The Plaintiffs object to this opinion,

1. Because it is in vague and indefinite terms; whereas it ought to have specified the acts which were to have the effect in question; to the end that they might appear to be acts of which there was evidence before the jury, and which, if proved, were capable in law of producing that effect.

2. Because the effect of those acts on the right of recovery, is not made to depend on the course and usage of the trade.

11. The 11th question was upon the 28th bill of exceptions, which was taken to the refusal of the Court to instruct the jury in substance that the only risk, the increase of which could affect the Plaintiff's right to recover, was the risk of *rightful* capture under the law of nations.

The Plaintiffs contend that what would give a mere pretext for
p. 523 unjust capture, was not sufficient to charge | the Plaintiffs with an increase of the risk insured against, so as to avoid the policy. Every thing was immaterial which did not increase the risk of rightful capture and condemnation ; and which did not furnish at least a ground of condemnation which the belligerent has holden to be a rightful ground.

Baruso had no interest in the ship, and yet the ship as well as the cargo was condemned—no doubt on the principle that it was a trade in time of war, not permitted in time of peace. But the license *diminished* the risk because it showed that it was a trade permitted in time of peace.

PINKNEY, *Attorney General, contra.*

1. As to the division of opinion in the Court below.

It is true the letter ordering the insurance does not in direct terms deny that no other person had an interest in the cargo, but it contains a strong implication to that effect. If any transaction requires *bona fides* it is a representation for insurance. It is the act of the insured and they ought not to shelter themselves under an ambiguity. If it be calculated to mislead it is sufficient.

It is true that nothing is stated negatively. But why name others as concerned who were not to be insured, unless to inform the underwriters respecting the whole transaction with reference to the national character of all parties concerned. It is calculated to excite in the minds of the underwriters a belief that it contains information on that subject. They who undertake to convey information must take care that it do not excite an idea which they did not mean to convey.

This point, however, is not considered as of very great importance.

2. The next question is much more important. This question arises on the 5th bill of exceptions.

The Court gave, in substance, the instruction which the Plaintiffs
p. 524 prayed, and yet the Plaintiffs excepted because | it was not exactly in their own words. The Plaintiffs had, among other things, given evidence that the papers found in Giles's trunk were *necessary* according to the usage and course of the trade, and then prayed the Court to instruct the jury that if they believed the evidence so offered, then there was no such concealment of the said papers as could affect the right of the Plaintiffs to recover ; and this was in truth the direction which the Court gave.

But the Court ought not to have given the direction as prayed. The concealment of the papers was unneutral; although the parties were justifiable in using them to protect their illegal trade. The whole transaction was unneutral: first, in concealing the papers, and secondly, in denying a knowledge of them. The belligerent had a right to see the papers. It was a clear belligerent right flowing from the right of search.

No Court of admiralty, however rapacious, has ever considered concealment of innocent papers as, *per se*, a ground of confiscation. But this was not a concealment of innocent papers. It was a concealment of papers tending to prove the property to be belligerent. It increased the suspicions already excited by other circumstances. Baxter was supercargo, and his acts bind the others, although he was a partner. All the partners are affected by the fraud of any one of them. 1 *Rob.* 105, *The Welvaart.* If this unneutral conduct brought the property into suspicion it is sufficient. If it subjects the property to such detention as would authorize abandonment, the Plaintiffs were not entitled to the opinion prayed in the 5th exception. In a case where there was concealment of such papers as were calculated to induce such suspicion as would require further proof, and this concealment followed by prevarication, we could not expect a prize Court to acquit. It would at least produce detention continued by an adjournment of the case.

This concealment, connected with the other circumstances, justified the condemnation. There were documents showing the property to be in four Americans. Among the concealed papers was a copy of the royal Spanish license, authorizing a Spanish subject resident | in Boston to p. 525
import goods into the United States from the Spanish colonies. The adventure appeared to be Spanish. It could only be carried on by a Spaniard. There was also concealed another paper of great effect—a power of attorney from Baruso to Baxter, the supercargo, in which Baruso says the cargo '*is laden for me and on my account and risk.*' It proved the property to be in Baruso, and that he was a Spanish subject. It calls him a *Spanish merchant.* It showed his *national* character to be belligerent, although he was resident in a neutral country.

It is not residence only which gives the national commercial character. The intention, the nature of the errand, the permanency of the residence, are all necessary ingredients.

The circumstances of suspicion were very strong. Baxter's receipt, &c. states him to be the *agent of Baruso.* The letters from Baruso's friends, the clearances, &c. &c. were all '*on account of the royal license,*' and stated that the cargo was to be delivered to Baruso. He was the cloak of the transaction, and he could only be a cloak by his *Spanish character.* When there are two sets of documents it is immaterial to the captors which they wished to conceal. All these circumstances

created too strong a suspicion to justify an acquittal. The case might have been explained but for the unfortunate conduct of the supercargo, which induced a denial of further proof. He, who could and ought to have explained the concealment, did not, but increased the suspicions by his prevarication. There were only three alternatives before the Court—to acquit, to condemn, or to allow further proof. The suspicion was too strong to acquit—the prevarication precluded further proof. There was nothing left but to condemn.

The first and most essential of all belligerent rights is that of visitation and search. The right to see all the documents is a necessary consequence of that right, or it would be nugatory. It was the duty of the supercargo, as a neutral, to show *all* the papers. Why did he show the neutral papers only? The object of the supercargo was to defeat an acknowledged belligerent right, and he endeavored to deceive the adjudicating Court. |

p. 526 STORY, *J.* I wish you to consider whether, if the trade be *necessarily* belligerent, the concealment of these papers can be considered as material.

PINKNEY. That is, whether they can make the case worse? Perhaps not.

3. The 3d point is as to the neutral character of Baruso by reason of his residence in the United States.

Locality is something; but not every thing. So is the time of emigration.

The general principle of the law of nations is, that the belligerent character belongs to the *subject* of the hostile nation wherever found. Mere change of place does not alter the character. It is easier for a neutral to slide into the character of an enemy, than for an enemy to fall into that of a neutral. But even in such cases, that great expounder of the law of nations, sir W. Scott, examines all the circumstances of the case, time of removal, permanency of residence, motive, and nature of his business. The case of *Collett* (8 *T. R.* 31, *Wilson v. Marryat*) has no bearing upon this case. The special verdict found Collett to be a citizen of the United States, and the case depended upon the treaty of 1794.

The case of Mr. Johnson is not more to the point. His office of American consul prevented his residence in London from affecting his national character. If he had not had the *animus revertendi* before the voyage of the Indian Chief was commenced, and had not departed before the arrival of the ship, the trade would have been adjudged unlawful.

The next case is that of G. W. Murray. Sir W. Scott not only forgot to administer justice in mercy, but pushed his principles of commercial law infinitely too far. The commissioners, under the 7th article of the British treaty,[1] gave Murray compensation on the ground that the

[1] Of whom Mr. Pinkney was one.

decision of sir W. Scott was wrong. | But, even upon the principles on p. 527
which that case was decided, residence alone does not constitute national character. The time of his removal and the nature of his employment were also considered.

So also in the case of the *Citto*, 3 *Rob.* 38, the nature of Mr. Bowden's residence in Holland was examined.

The question always is, whether he has become, not a citizen or subject, but a *merchant of that country ;* i. e. a general merchant. But did Baruso become a general American merchant ? Was his trade American ? Was it neutral ? No. He carefully wrapped himself up in the folds of his license, and fenced himself round to exclude the American character.

The case of *Duguet v. Rhinelander* is not more applicable than the others. The Plaintiff was a naturalized citizen, had been long resident and was embarked in the general trade of the country.

As to the Plaintiff's 2d objection to the opinion, because there was no evidence upon which the Court could raise the hypothesis that Baruso came to this country for no other purpose than to carry on that particular trade—the fact is otherwise. There was evidence from which the jury might infer the fact supposed by the Court ; and they have found it.

4. The 4th question arises upon the 7th bill of exceptions, and is whether the Court ought to have left it to the jury to decide whether Baruso had an interest in the cargo.

Perhaps it was a question of law dependent on the construction of the contract, and ought to have been decided by the Court. But the Plaintiffs cannot complain that the Court left it to the jury to decide a question of law which the Court ought to have decided against him. Baruso had an interest. He was a partner. The written contract says '*he agrees to the following* PARTNERSHIP.' It is not contended that they are bound by the word '*partnership*' if the contract does not in law amount to a partnership. But the term may explain other doubtful expressions. Livingston was to contribute | vessel and funds—Baruso p. 528
the license, and services, as far as his services were necessary to give effect to the license. Here was a joint contribution for common benefit. It was not necessary that the losses should be equally borne, nor the profits equally divided. Here was also a participation of profits, even in an equal degree, in a certain event. So there was a contribution in loss. If the expedition failed Livingston would lose his goods, and Baruso the use of his license for a certain time. The suffering, in their own estimation, would be equal. In case of loss upon the sales, Baruso was to contribute, and if the cargo should be lost by reason of a defect in the license, the whole loss would fall upon him. He is guarrantee also for the consignees in South America. He had also an interest in

the specific goods. In a certain case he was to have a right to take a portion of the goods themselves. The policy was underwritten while the vessel was on her return voyage, and while he had this interest. It was not a mere contingency, but a vested interest.

It is contended that if the usage and course of the trade authorized the use of a Spanish cover, a real Spanish interest would not increase the risk. But the warranty of American property forbids a mixture of a belligerent interest; at least it would in a Court of admiralty.

5. The 5th question was upon the 8th bill of exceptions.

This opinion will not bear the construction which the Plaintiffs have put upon it. It does not mean to say that the papers to be innocent must be *necessary* according to the usage of the trade; but if it was the usage of the trade to have such papers, then they were innocent.

6. The Plaintiffs were not entitled to the instruction prayed for in the 9th bill of exceptions, because it was an instruction as to a *fact*; viz. that the Defendants had notice that the voyage was to be carried on under a royal Spanish license. Whether they had such notice depended upon the question whether they recollected the letter of Church and Demmill, and whether they knew it was the same ship and the same voyage. |

p. 529 7. The 7th question was upon the 11th bill of exceptions, and was whether parol evidence could be given of an usage which grew out of a law, inasmuch as the law itself was not proved by competent evidence.

It was supposed that the law should be first proved before evidence could be given of the usage dependent on that law.

8. The 8th question arose on the 13th bill of exceptions, and was whether the Defendants were bound to take notice of the Spanish laws of trade.

There is no adjudged case which requires underwriters to take notice of such laws, although they are bound to know the *usage* of the trade. If there was no evidence of the law, the opinion was immaterial and could not injure the Plaintiffs.

9. The 9th question arose upon the 20th bill of exceptions, and was whether reasonable notice was a question exclusively for the jury.

The Plaintiffs had no right to except to this opinion.

Reasonableness of time is a matter of fact to be found by a jury under the direction of a Court. And the Court may direct them from certain facts, whether it be reasonable. In the same manner as, in trover, the Court may instruct the jury that a demand and refusal are evidence of a conversion.

10. The 10th question arises upon the 24th and 25th exceptions, and was whether the Defendants were liable for an increase of risk in consequence of any acts done by the Plaintiffs to avoid seizure and confiscation

by the Spanish government for illicit trade—the Plaintiffs having taken that risk upon themselves.

The principal objection to this opinion seems to be that it is too abstract, and does not state the facts which were supposed to increase the risk. But there were facts enough stated in the bill of exceptions to ground the instruction upon. All the paraphernalia of the Spanish garb, were acts done to protect the cargo from | confiscation by the Spanish p. 530
government for illicit trade, and certainly increased the risk of capture by the British, which was the only risk which the Defendants took upon themselves. 1 *Marshall*, 416, *Condy's edition.* 1 *N. Y. T. R.* 549.

11. The 11th question arose upon the 28th bill of exceptions, and was whether the risk, the increase of which could affect the Plaintiff's right to recover, could be any other than the risk of rightful capture under the law of nations.

It was not necessary that the risk should be of just condemnation under the law of nations. It was sufficient if it increased the risk of condemnation upon any principle recognized by the Courts of the captor.

The Court was not bound to give an opinion unless prayed; and if the opinion prayed be not correct the Court is not bound to give any other. 1 *Marshall*, 473, *Condy's American edition, Sterry v. Delaware Insurance Co.*

HARPER, *in reply.*

1. Even if the letter ordering the insurance did contain the intimations supposed, yet it did not amount to a *representation*; which must always be a *positive* affirmance or denial of some fact—see the opinion of this Court in this cause, 6 Cranch, *p.* 274, *and Marshall*, 33.

2. As to the 5th exception, it is said that the Court gave in substance, the opinion prayed; yet if the prayer and opinion were both wrong, the Plaintiffs had a right to except. But it is not in substance the same. Perhaps if taken alone it might be so considered, but when taken in connection with the refusal to give the instruction as prayed it is, or must be understood as being different.

It was not merely the delivery of the papers to Giles, but it was also the conduct of Baxter in denying the existence of the papers, &c. which was insisted upon by the Defendants as constituting the concealment. The Defendants were still at liberty to argue to the jury | that p. 531
the concealment by Giles, in connexion with the conduct of Baxter, was such a concealment. By refusing the Plaintiffs prayer and giving the instruction as they did, the inference was plain that it did amount to such a concealment.

But there is another more important objection to the opinion. The concealment, even of criminal papers, is not a ground even of detention —nor even to deny further proof. *Spoliation* alone has that effect.

(*See the answer to the Prussian memorial in the case of the Silesia loan.*) If the papers are found and produced, it excites only a slight suspicion that other important papers may be concealed. But even if it did authorize a denial of further proof, yet it is only in a case where so strong a suspicion exists from other circumstances that the Court cannot acquit. But here no such suspicion was raised by the other circumstances. The concealed papers themselves proved the neutrality of the property.

The case did not need further proof. The power of attorney of Baruso was irrevocable—if not expressly, yet by implication.

There is no case which decides that *concealment* of papers is a ground to refuse further proof. There is a great difference between *concealment* and *spoliation* of papers, as to the degree of suspicion excited. When the papers are destroyed, the mind is left to conjecture and the strongest suspicion may be justified. But when the papers are found and produced, the whole extent of their criminality appears at once.

It is true that the act of an agent binds his principal—but *civiliter*, not *criminaliter*.

Spoliation is a criminal act in the eye of a Court of admiralty. Upon the whole then,

1. This was not a case which required further proof. 2. Concealment even of criminal papers is not a ground to refuse further proof if the case required it; and 3. The papers were innocent.

This trade was within the exception of the order in council of the
p. 532 24th June, 1802, and therefore the property | was not liable to condemnation on account of Baruso's being a Spanish subject, he being an *inhabitant* of a neutral country, and so stated to be upon the face of the papers. It was a trade from an enemy's colony to a neutral country. The papers therefore, in the eye of a Court of admiralty, were perfectly innocent. The king in council has a right to relinquish part of the belligerent rights which the nation might claim according to the law of nations. He has done so. He has said that the property of a Spanish subject, being an inhabitant of a neutral country, shall not be liable to confiscation.

If the papers had been destroyed, suspicion might have been thrown upon the transaction, because their innocence could not appear. But when found they showed Baruso's interest to be as free from capture as Livingston's.

3. As to the 6th exception.

We admit that something more than mere residence is necessary to constitute national character. We admit there must be an intent to trade. *Time* also is a necessary ingredient. But no particular length of time is required. The residence must be so long only as to show his real intention. It is not necessary that he should embark in all the trade

of the country. It is sufficient if he carry on a part of it. It is sufficient to make it the trade of this country, if the benefits of it belong to this country, and not to Spain. He employed our ships, our seamen and our merchants, all of whom were to make a profit. It was a trade between a Spanish colony and the United States. Great Britain never complained of such a commerce as this. She complained only of a commerce between the colony and the mother country. If he had come to this country with a view to the war, and to carry on a trade belligerent in it's nature, or not usual in time of peace, there might be some ground for the objection. But this commerce was neutral in it's nature. The Court meant to say that if the trade was such that a neutral could not carry it on, then, &c. There was no evidence that he came to carry on a trade which, as a neutral, he could not carry on. It is true it was a trade which, as *an* | *American*, he could not carry on; but that did not make p. 533
the trade belligerent. The Spanish government might have permitted an American to carry it on, and it would still have been a neutral trade.

4. As to the 7th bill of exceptions.

If the question of Baruso's interest be a question of law, then we contend that he had no such interest as could falsify the warranty.

He was not a partner. To constitute a partnership there must be an universal participation in gain and loss in all events. But in some events he was not to participate in either. In one event only was he to share the gain, and in one only was he to participate in the loss. He was not a joint owner of the cargo. In trover or replevin, he could not have proved an interest. If he had sold the cargo the vendee would have had no title. If he had given a note in the name of all, he only would have been bound. This interest was merely contingent, like that of a consignee in his commissions.

5. As to the 8th bill of exceptions.

The warranty of neutrality was a protection to the Defendants against all belligerent interests and belligerent appearances, and therefore it was not necessary to disclose the belligerent cover of the real neutral interest. It is sufficient that the property insured was strictly and really neutral.

6. As to the 9th exception.

The letter of Church and Demmill, stating that the vessel was to trade under a license, was referred to in the letter which ordered the insurance and which was laid before the Defendants. It is a principle of law that they are supposed to know what they had the means of knowing and what it was their interest to know. It was proved that the letter of Church and Demmill had been laid before them on a former day, and when they were again referred to it, they ought to have recollected its contents, or have asked for it again.

7. As to the 11th bill of exceptions. |

p. 534 An usage cannot be against law, and yet we were prevented from proving it, because it was conformable to law. According to the opinion of the Court, we were bound to prove that the usage was contrary to law, before we could prove it by parol.

8. As to the 13th bill of exceptions.

The Defendants were as much bound to know the *laws* of the trade, as the *usages* of the trade.

10. As to the 24th and 25th bills of exceptions.

The knowledge which the Defendants had of the trade and its usage at the time of underwriting the policy, authorized the Plaintiffs to use all the means necessary to make the voyage legal.

11. As to the 28th bill of exceptions.

The case cited is, that if there be an edict under which the belligerent does condemn, although unlawfully, it ought to be disclosed.

But here was no such edict, the condemnation was not only unlawful but unauthorized.

The Court ought not wholly to reject the opinion prayed, if it be not exactly correct; because it leaves the jury to infer that no part of it is correct. They ought to go on and state what the law is.

March 15th...MARSHALL, *Ch. J.* after stating the case, delivered the opinion of the Court as follows:

This perplexed and intricate case, which is rendered still more so by the manner in which it has been conducted at the circuits, has been considered by the Court. Their opinion on the various points it presents will now be given.

If the question on which the Court was divided be considered literally, the answer must undoubtedly be, that the letter of the 25th of March, 1806, contains no averment that no person other than Livingston,

p. 535 Gilchrist, | Griswold and Baxter, were interested in the return cargo of the Herkimer, nor that all the persons interested therein were native Americans. This would be perceived from an inspection of the letter itself, and there would be no occasion for an application to the Court concerning its contents. But the real import of the question is this. Is the language of the letter such as to be equivalent to an averment that the owners named in it are the sole persons who were interested in the return cargo? If it does amount to such an averment, then it is a representation, and if it be untrue, its materiality to the risque, must determine its influence on the policy. A false representation, though no breach of the contract, if material, avoids the policy on the ground of fraud, or because the insurer has been misled by it.

Upon reading the letter on which this insurance was made, the impression would probably be that the four persons named in it were the

sole owners of the return cargo of the Herkimer. The inference may fairly be drawn from the expressions employed. Such was probably the idea of the writer at the time. The writer however might have, and probably had other motives for his allusion to other owners, than to convey the idea that there were no others. The premium might in his opinion be affected in some measure by stating the little apprehension from capture, which was entertained by others, and especially by that owner who was the supercargo. If, however, it was not supposed by Mr. Gilchrist, that the persons named in his letter were the sole owners of the cargo, or if in fact they were not the sole owners, he has expressed himself in so careless a manner as to leave his letter open to misconstruction, and, in the opinion of some of the judges, to expose his contract to hazard in consequence of it.

But that part of the Court which entertains this opinion, is also of opinion, that the letter ought not to be construed into a representation of any interest to grow out of the voyage distinct from actual ownership of the cargo. ' *The owners*, says Mr. Gilchrist, are already insured against the dangers of the seas,' &c. His application was for the owners ; and when he proceeds to state, that others were concerned, he must be understood to say that they were concerned as owners. Consequently if the letter implies an averment, that he has named all the owners, | it implies p. 536
nothing further, and ought not to be construed into a representation, that there were no other persons interested in the safe return of the cargo.

Others are of opinion, that to constitute a representation there should be an affirmation or denial of some fact, or an allegation which would plainly lead the mind to the same conclusion. If the expressions are ambiguous, the insurer ought to ask an explanation, and not substitute his own conjectures for an alleged representation. In this opinion the majority of the Court is understood to concur. The instruction then applied for by the counsel for the Plaintiffs, on which the Circuit judges were divided, ought to have been given.

5th. A majority of the Court is also of opinion, that the instruction prayed for as stated in the 5th exception ought to have been given. If the jury believed the facts offered in evidence by the Plaintiffs, which were that by the usage of the trade to Peru from any foreign port, it was necessary for the ship to have on board, on her return voyage, the Spanish and other material papers delivered by Baxter to Giles, then there was no such concealment of said papers as can affect the right of the Plaintiff to recover in this action. In general concealment of papers amounts to a breach of warranty. But when the underwriters know, or, by the usage and course of the trade insured, ought to know, that certain papers ought to be on board for the purpose of protection

in one event, which, in another, might endanger the property, they tacitly consent that the papers shall be so used as to protect the property. The use of the Spanish papers was to give a Spanish character to the property in the Spanish ports; and, of the American papers, to prove the American character of the property to other belligerents. But to have exhibited the Spanish papers to a British cruizer and thus to induce a suspicion that the property was belligerent, would have been not less improper than to have exhibited the proofs of American property in a port of Peru, and thus to defeat the sole object for which Spanish papers were necessarily taken on board.

6th. A majority of the Court is also of opinion, that under all the
p. 537 evidence in the cause, Baruso, was to be | considered as an American merchant, whether he carried on trade generally, or confined himself to a trade from the United States to the Spanish provinces. The Circuit Court therefore erred in making the neutral character of Baruso to depend on the kind of trade in which he was engaged, instead of its depending on residence and trade, whether general or limited.

7th. The instruction of the Circuit Court to which the 7th exception was taken, is obviously formed on a plain and total misconstruction of the former opinion, of this Court. In no part of that opinion has the idea been indicated, that the interest of Baruso was a question solely for the consideration of the jury unaided by the judge. It is certainly a question on which it was proper for the judge to instruct the jury. The opinion, given by this Court, was, that 'if the jury should be of opinion that the Spanish papers, mentioned in this case, were material to the risk, and that it was not the regular usage of trade to take such papers on board, the non-disclosure of the fact, that they would be on board, would vitiate the policy; but if the jury should be of opinion that they were not material to the risk, or that it was the regular usage of the trade to take such papers on board, that they would not vitiate the policy.' The instruction of the Circuit Court to the jury ought to have conformed to this direction. Instead of doing so, those instructions were to exclude entirely from the consideration of the jury the regular usage of trade. They refuse to allow any influence to a fact, to which this Court attached much importance. It is the unanimous opinion of this Court, that in giving this instruction the Circuit Court erred.

8th. The Circuit Court seem also to have varied from the directions formerly given by this Court, in the opinion to which the 8th exception is taken. This Court placed the innocence or guilt of having on board the Spanish papers, mentioned in the case, on the regular usage of trade; the Circuit Court has made their innocence to depend on their being necessary.

The counsel for the Defendants contends, that this is a distinction

without a difference; but it is impossible to say what difference this distinction might make | with the jury. It is also the opinion of this Court p. 538
that, in estimating the materiality of the papers to the risk, their effect, taken together, should be considered, not the effect of any one of them taken by itself.

9th. The opinion which the Court refused to give, to which refusal the 9th exception is taken, depends on several distinct propositions which must be separately considered.

The letter, on which this insurance was made, contains a direct reference to a previous letter written by Church and Demmill, which was laid before the company, for a description of the ship. The first question to be considered is, did this reference make it the duty of the directors to see that letter, and are they, without further proof, to be considered as having read it. The letter was addressed to, and it is to be presumed remained in the possession of, the agent who made this insurance.

It is a general rule, that a paper, which expressly refers to another paper within the power of the party, gives notice of the contents of that other paper. No reason is perceived for excepting this case from the rule. It is fairly to be presumed that, on reading the letter of Gilchrist, the board of directors required the agent of the Plaintiffs to produce the letter of Church and Demmill, unless they retained a recollection of it. In that letter they were informed that the vessel had sailed for Lima, with liberty to go to one other port in South America, and that 'she had permission to trade there.'

What was the amount of the information communicated by this letter?

The permission to trade was unquestionably a permission granted by the authority of the country. It was a permission from the Spanish government. But whether this permission was evidenced by a license, or by other means, was to be decided by other testimony; whether it conveyed notice to the underwriters that such a license was on board the ship, depends, in the opinion of part of the Court, on the usage of the trade. Those, who entertain this opinion, think, that as this was submitted | to the jury, the Court committed no error in refusing to say that p. 539
the Defendants were to be considered as knowing that the Herkimer sailed with a Spanish license on board. In estimating the increase of risk, it was certainly the duty of the jury to consider it as a voyage known to the underwriters to be carried on for the purpose of trading to Lima, and that the Herkimer had such papers on board as were usual in such a trade, but whether the license be such a paper or not, the jury were to judge as of other facts.

A majority of the Court, however, is of a different opinion. The underwriters, having full notice that the voyage was permitted, might fairly infer that it was licensed by the Spanish government; because in

no other way would it be permitted. The whole question turned upon the construction of a written document which it belonged to the Court to make.

11th & 13th. The 11th & 13th exceptions may properly be considered together, since they are taken to opinions given on the same subject, and do not essentially vary from each other. The Circuit Court appears to have supposed that the general usage and course of trade could not be given in evidence, or, if given in evidence, ought to be disregarded, if the jury should be of opinion that such usage was founded on the laws or edicts of the government of the country where the usage prevailed. That is not the opinion of this Court. The usage may be proved by parol, and the effect of the usage remains the same, whether it originated in an edict or in instructions given by the government to its officers. Any conjectures, which the jury or the witnesses may make on this subject, can be of no importance, and ought to have no influence on the case. Neither can it be more necessary to give notice of a usage founded upon statute, than of a usage founded on instructions. The Circuit Court therefore erred in directing the jury that the underwriters were not bound to take notice of the usage of trade, if they should be of opinion that the trade was prohibited by the law of Spain.

20th. The opinion of the Circuit Court to which the 20th exception was taken, appears to be entirely correct. |

p. 540 24th & 25th. The 24th & 25th exceptions are to the same opinion somewhat varied in form, and rendered more explicit, on the application of the Plaintiffs, than it had been in the instruction given on the motion of the Defendants. It is essentially the same with that to which the 7th exception was taken, and appears to have been founded on a total misapprehension of the former opinion given by this Court. In that opinion it was expressly stated, that such papers as, conformably to the regular usage of trade, were to be taken on board a vessel, would not vitiate the policy. ' The acts, done by the insured to avoid seizure and confiscation under the laws and regulations of the Spanish government,' which are mentioned in the application made to the Court by the counsel for the Defendants, comprehend these papers. This question therefore was decided by this Court on the former argument of this cause, and the Court is now unanimously of opinion, that the Circuit Court erred, both in granting the prayer of the Defendants, and refusing that of the Plaintiffs.

28th. In the opinion, to which the 28th exception was taken, this Court concurs with the Circuit Court. The direction, asked by the counsel for the Plaintiffs, ought not to have been given. It is expressed in terms which, if assented to, might misguide the jury. Rightful capture according to the law of nations might be construed to mean capture for

a cause which would justify condemnation according to the law of nations as construed in the United States. But capture will always be made on suspicion of what the belligerent construes to be cause of forfeiture, and capture authorizes abandonment. Such acts or omissions therefore, of the Plaintiffs, as would induce a capture and detention according to the common practice of the belligerents, are proper for the consideration of the jury in estimating the risk.

This Court is of opinion, that there is error in the proceedings of the Circuit Court in this cause, in refusing to give the opinion on which that Court was divided; and also in the opinions to which the 5th, 6th, 7th, 8th, 9th, 11th, 13th, 24th and 25th exceptions are taken. This Court doth therefore reverse and annul the judgment rendered by the Circuit Court, and doth remand the cause to the said Court that a *venire facias* | *de novo* may be awarded, and other proceedings had therein according p. 541
to law.

STORY, *J.*

I concur in the judgment of reversal which has just been pronounced. But as in some instances I differ from the opinions expressed by the majority, and in others I concur upon grounds somewhat variant, I have ventured to express my own views at large upon the important points which have been so fully and ably argued.

The first question which presents itself is on the certificate of division. To constitute a representation, there should be an explicit affirmation or denial of a fact, or such an allegation as would irresistibly lead the mind to the same conclusion. If the expressions are ambiguous, or such as the parties might fairly use without intending to authorize a particular conclusion, the insured ought not to be bound by the conjectures, or calculations of probability, of the underwriter. The latter, if in such case he deems the facts material, ought to make further inquiries. In the letter of the 26th of March, 1806, there are no words negativing the existence of other interests than those of the Plaintiff's and Messrs. Griswold and Baxter.

The negative, if any, is to be made out by mere inference or probable conjecture, and as there is no reason to suppose that the statement was made with that intent, I am satisfied that it did not amount to a representation negativing the existence of such interests. The Court below ought therefore to have given the direction prayed for by the Plaintiffs' counsel.

But, even admitting that the letter did contain the representation contended for, I am well satisfied that it was substantially true. It is not pretended that any other person except Baruso had any interest in the cargo; and it is very clear that, whatever might be his contingent interest in the possible profits of the voyage, he had no vested interest

in the cargo itself. He was not a partner, for he wanted one of the essential characteristics of partnership, a direct vested interest in the joint funds.
p. 542 He possessed a mere possibility which, in | the successful termination of the voyage, might entitle him to a right of action for a proportion of the profits; or, in a specified case of election, to take a proportion of the property itself. But it was not such an interest as was liable to capture, or such as could be claimed or condemned in a prize Court. It was less certain than even a *respondentia* or bottomry interest, which have not been allowed to be asserted before the prize jurisdiction. The commissions of a supercargo upon the sales might, with as much propriety, be deemed a vested interest in the cargo consigned to his care.

I pass over, for the present, the fifth exception.

The sixth exception points to the national character of Baruso. As Baruso emigrated from Spain to the United States during a time of peace, no question arises as to the ability of a belligerent subject to change his national character *flagrante bello*.

It is clear by the law of nations that the national character of a person, for commercial purposes, depends upon his domicil. But this must be carefully distinguished from the national character of his trade. For the party may be a belligerent subject and yet engaged in neutral trade; or he may be a neutral subject and yet engaged in hostile trade. Some of the cases respecting the colonial and coasting trade of enemies have turned upon this distinction.

But whenever a person is *bona fide* domiciled in a particular country, the character of the country irresistibly attaches to him. The rule has been applied with equal impartiality in favor and against neutrals and belligerents. It is perfectly immaterial what is the trade in which the party is engaged, or whether he be engaged in any. If he be settled *bona fide* in a country with the intention of indefinite residence, he is, as to all foreign countries, to be deemed a subject of that country. Without doubt, in order to ascertain this domicil, it is proper to take into consideration the situation, the employment, and the character of the individual. The trade in which he is engaged, the family that he possesses, and the transitory or fixed character of his business, are ingredients which may properly be weighed in deciding on the nature of an equivocal
p. 543 residence or | domicil. But when once that domicil is fixed and ascertained, all other circumstances become immaterial.

The prayer of the Plaintiffs (which was refused by the Court) in effect asked that if Baruso was *bona fide* settled in New York, and had no domicil elsewhere, he was not to be considered as a belligerent. The Court in effect declared that the character of his trade, and not his mere domicil, fixed his national character. There was therefore error both in the refusal and in the direction of the Court.

The seventh exception arose from a misconception of the opinion of the Supreme Court. The Court did not mean to intimate that whether an interest increased the risk or not was a mere question of fact for the jury. On the contrary the Court considered that it was a mixt question of law and fact on which the Court were bound to direct the jury as to the law. As the Court below were of opinion that Baruso was not a *joint owner* of the cargo, (in which opinion I concur) the question ought not to have been left to the jury in the broad and unqualified terms which are used. Strictly and legally speaking, Baruso had no interest in the cargo: and therefore 'his interest could not be material to the risk;' and if the point, meant to have been left to the jury, was, whether the concealment of the name or the possibility of interest of Baruso increased the risk it should have been left with proper directions as to the effect of the usage of trade and neutral character of Baruso in settling that question. If the usage of trade allowed or required such cover, or if Baruso were a neutral, I am not prepared to say that, in point of law, the risk could thereby have been increased. It would have been a mere inquiry into the possible hazards from the rapacity of belligerents, or the possible effects of one Spanish name instead of another. Men reason differently upon such speculations.

Nor am I prepared to say that it is ever necessary for the assured to declare the national character of other distinct interests engaged in the same adventure, unless called for by the underwriter. If such interests are not warranted or represented to be neutral, the underwriter must be considered as calculating upon the | possible existence of belligerent p. 544
interests, or as waving any inquiry.

The fifth and eighth exceptions may be considered together as they are founded upon the legal effect of the taking on board and the concealment of the papers, by Baxter, from the belligerent cruizer. The prayer of the Plaintiffs in the fifth exception was for a direction that under all the circumstances of the case there was no such concealment as would avoid the Plaintiff's right to recover. And if, in point of law, the Plaintiffs were entitled to such direction, the Court erred in their refusal, although the direction, afterwards given by the Court might, by inference and argument, in the opinion of this Court, be pressed to the same extent. For the party has a right to a direct and positive instruction; and the jury are not to be left to believe in distinctions where none exist, or to reconcile propositions by mere argument and inference. It would be a dangerous practice, and tend to mislead instead of enlightening a jury.

The opinion of the Court in effect was, that the concealment of *any* papers, which were *necessary* to be on board by the usage and course of the trade, did not affect the Plaintiff's right to recover. But (in conformity with the prayer of the Defendants in the eighth exception) that

if any of the papers increased the risk, and were not necessary by the usage and course of trade, and the fact, that such papers would accompany the cargo, was not disclosed to the underwriters, the Plaintiffs were not entitled to recover.

It is undoubtedly true that the warranty of neutrality extends, not barely to the fact of the property being neutral, but that the conduct of the voyage shall be such as to protect and preserve its neutral character. It must also be conceded that the acknowledged belligerent right of search draws after it a right to the production and examination of the ship's papers. And if these be denied, and the property is thrown into jeopardy thereby, there can be no reasonable doubt that such conduct constitutes a breach of the warranty.

Concealment and even spoliation of papers, do not ordinarily induce
p. 545 a condemnation of the property; but | they always afford cause of suspicion, and justify capture and detention. In many cases the penal effects extend in reality, though indirectly, to confiscation. For if the cause labor under heavy doubts, if the conduct be not perfectly fair, or the character of the parties are not fully disclosed upon the papers before the Court, the concealment or spoliation of papers is made the ground of refusing further proof to relieve the obscurity of the cause; and all the fatal consequences of a hostile taint follow on the denial.

But the question must always be whether there be a concealment of papers material to the preservation of the neutral character. It would be too much to contend that every idle and accidental, or even meditated, concealment of papers, manifestly unimportant in every view before the prize tribunal, should dissolve the obligation of the policy. And if by the usage and course of trade it be *necessary* or *allowable* to have on board spurious papers covered with a belligerent character, whatever effect it may have upon the rights of the searching cruizer, it would be difficult to sustain the position, that the concealment of such papers, which, if disclosed, would completely compromit or destroy the neutral character, would be a breach of the warranty. In such case the disclosure of the papers produces the same inflamed suspicions, the same legal right of capture and detention, the same claim for further proof, and the same right to deny it, as the concealment would. If the concealment would induce the conclusion that the interest was enemy's covered with a fictitious neutral garb, the disclosure would not in such a case less authorize the same conclusion. In such case it would depend upon the sound discretion of the Court, under all the circumstances of the case, to allow the veil to be drawn aside, and admit or deny the Claimant to assume his real character. Whenever, therefore, the underwriter has knowledge and assents to the cover of neutral property under belligerent papers, (as he does in all cases where the

usage of the trade demands it) he necessarily waves his rights under the warranty, so far as the visiting cruizer may demand the disclosure of such papers. In other words, he authorizes the concealment in all cases where it is not necessary to assume the belligerent national character for the purpose of protection.

If this view be correct it is clear that the Court ought to have given p. 546
the direction prayed for by the Plaintiffs. Sitting here under a clause in the policy which enables us to look behind the sentence of condemnation, we see that the property was really neutral; and if the jury believed the evidence, the concealment was of papers which were authorized by the course of trade for the voyage, and so far from giving a hostile character, was the only means of preventing a strong presumption of that character. If we but consider the known course of decisions in the British Courts on questions of this nature, we shall find that, independent of the question of the neutral or hostile character of the ostensible owner, the trade between the belligerent mother country and its colony affects with condemnation the property engaged in it, although such property be neutral, and there be an interposition of a neutral port in the course of the voyage. On examining the papers in this case it will be found that they point, though obscurely, to such an ultimate destination. And at all events the existence of contradictory papers, one sett American, the other Spanish, would, in a Spanish trade, afford an almost irresistible inference in a prize Court that the property was really Spanish—*Noscitur ab origine*. It would take its character from its origin.

But it is immaterial, in my view, whether a prize Court would under such circumstances acquit or condemn. When the cover of a Spanish character was allowed, it was allowed for the purposes of protection; and the disclosure of it was not required elsewhere than in the Spanish dominions. One of the risks against which the insured meant to guard himself was, in my judgment, a loss on account of the use of the Spanish character: a loss which might have been more plausibly resisted, if there had been a disclosure instead of a concealment of it.

The Court also erred in declaring (in the eighth exception) that the taking on board of any of the papers, which were not *necessary* by the usage of the trade, if the risk thereby were increased, avoided the Plaintiffs' right to recover. The effect of the whole papers should have been taken together. The evidence did not authorize the Court to consider and separate the effect of | each single paper. If one unnecessary p. 547
paper might have increased the risk, if singly considered, and yet, if accompanied by the others, it would not have had that effect, certainly the existence of that paper with the others would not have destroyed the right of the Plaintiffs. Yet the opinion of the Court would have authorized the jury to draw a different conclusion.

The Court should have directed the jury that if the papers were authorized by the usage and course of the trade, the concealment of them, under the circumstances, did not vitiate the policy; and that if some were authorized and others not, yet the possession or concealment of the latter with the former did not vitiate the policy, unless the unauthorized, so connected with the authorized, papers increased the risk.

The question, presented by the 9th exception, is whether the Defendants are to be considered as having notice that the voyage insured was to be pursued under a Spanish license. The letter of the 26th March, 1806, expressly refers to the letter of 17th of February, 1806, which had been laid before the underwriters; and they must therefore be deemed conversant of all the facts therein stated. A party shall be taken to have notice of all facts of which he has the means of knowledge in his own possession, or is put directly upon inquiry by reference to documents submitted to his inspection. In the letter of the 17th February the ship is declared to have a *permission* for the voyage, which in this trade can be understood in no other sense than a *license*. The Court ought therefore to have given the direction prayed for by the Plaintiffs.

The Court erred in the opinion expressed in the 11th exception. The course and usage of trade may in all cases be proved by parol, whether such course and usage of trade arise out of the edicts or out of the instructions of the government, and whether the trade be allowed or prohibited by such edicts or instructions.

The Court erred also in the latter part of their direction to the jury under the 13th exception. It was immaterial whether the trade was or was not prohibited by the laws of Spain. In either case the underwriters |
p. 548 were bound to take notice of the usage and course of the trade. The public laws of a country, affecting the course of the trade with that country, are considered to be equally within the knowledge and notice of all the parties to a policy on a voyage to such country.

The 20th exception cannot be supported. The opinion of the Court was entirely correct.

The 24th and 25th exceptions ought to be considered together in order to present the opinion of the Court below with its full effect. It is clear that any acts done by the assured in the voyage according to the course and usage of the trade, although such acts may increase the risk, do not vitiate the policy. This opinion was pronounced by this Court on the former argument of this case, in reference to the Spanish papers to which the present application of the Defendants obviously pointed. The Court therefore erred in granting the prayer of the Defendants, and in refusing that of the Plaintiffs.

The last (the 28th) exception cannot be sustained. The proposition is conceived in too general terms, and might mislead the jury. Any acts

or omissions of the insured or his agents which, according to the known edicts or decisions of the belligerents, though not according to the law of nations, would inhance the danger of capture or condemnation, might, if such acts or omissions were unreasonable, unnecessary or wanton, form a sound objection to the right of recovery. The insured can have no right to jeopardize the property by any conduct which the fair objects of the voyage, or the usage of the trade do not justify.

M'Call and al. v. The Marine Insurance Company.

(8 Cranch, 59) 1814.

If a policy insures against 'unlawful arrests, restraints and detainments of all kings, princes,' &c. the qualification, 'unlawful,' extends in its operation as well to 'restraints and detainments' as to 'arrests;' and in such case, a detainment by a force lawfully blockading a port is not a peril insured against by a policy containing a warranty of neutrality.

ERROR to the Circuit Court for the district of Maryland.

This was an action on a policy underwritten by the Defendants, upon all kinds of lawful goods and merchandize, on board the ship *Cordelia*, on a voyage from the Island of Teneriffe, to Surabaya, and at and from | thence to Philadelphia, warranted American property. p. 60
The ship sailed on the voyage, on the 5th of April, 1811, having on board a cargo of lawful goods, the property of the Plaintiffs, of the value of 15,000 dollars, and pursued the voyage until the 18th of July following, when, being in a place called Madura Bay, within about twelve hours sail of Surabaya, she was boarded by an officer of a British frigate, forming one of a squadron, then actually blockading the port of Surabaya, and all the other ports of the islands of Java and Madura. The frigate took possession of the Cordelia, and conducted her to the admiral commanding the blockading squadron, who, on the next day, dismissed the Cordelia, after indorsing her papers, and warning the master not to enter the port of Surabaya, or any other port in the island of Java, or of the island of Madura, on pain of capture. On the same day, the Cordelia made another attempt to enter Surabaya, but was chased by the same British frigate, and taken possession of a second time. After being detained two days, the Cordelia, was again released, and the master was ordered to depart instantly from the coast of Java, and the neighborhood of Surabaya, upon penalty of capture, and impressment of his men. The master, finding it impracticable to pursue his voyage further, resolved to return to Philadelphia, where he arrived on the 19th of November, 1811. At the time of sailing on the voyage from Teneriffe, the blockade of Java was unknown to the parties. The Plaintiffs abandoned to the Defendants, immediately after the arrival of the Cordelia

at Philadelphia, which gave them the first knowledge of the occurrences. The Defendants refused to accept the abandonment.

The policy contained the usual risks, except that the word '*unlawful,*' was printed before '*arrests,*' so that the clause stood, '*unlawful arrests, restraints, and detainments of all kings, princes, or people of what nation, condition or quality soever.*' The declaration alleges, that the ship and cargo were, during the voyage, ' by persons acting under the authority of the British government, and by a certain ship of war belonging to that government, unlawfully seized, restrained, and detained,' and thereby become totally lost.

p. 61 The Circuit Court directed the jury, that, on this | state of facts, the Plaintiffs were not in law entitled to recover; to which the Plaintiffs excepted and brought this writ of error.

HARPER, *for the Plaintiffs,*

Insisted that this direction was erroneous; because the voyage was broken up, and lost.

1st. By men of war;—

2d. By *detention of princes*; the blockade having prevented the accomplishment of the voyage.

That the Plaintiffs had therefore a right to abandon, and were entitled to recover for a total loss.

In support of his argument, he cited the case of *Barker v. Blakes*, 9 *East*, 280, cited also in 2 *Marshall*, 835, *Appendix.*

JONES, *contra.*

This case is very distinguishable from that of *Barker v. Blakes.*

1st. In that case, the voyage was interrupted as to the ultimate and only port of destination. Here, there was an interruption as to an intermediate port only, which cannot, we contend, constitute a total loss. The adventure from Teneriffe to Philadelphia, might have been as profitable as the accomplishment of the whole voyage.

Another distinction between the two cases arises from the different phraseology employed in the respective policies. The English policy employs general words, so as to include *any* detention of princes, &c. Here, the policy is limited to *unlawful* detention of princes, &c. Unless, therefore, this detention can be shown to be unlawful, the case is not within the policy; and it is clear, that it was not unlawful, unless the blockade was so. But this is not contended; the blockade was maintained by an adequate force, and was in every respect conformable to the law of nations. |

p. 62 Again, in the case of *Barker v. Blakes*, the blockade of Havre was not considered as the cause of the destruction of the voyage; the detention in Bristol, was the only ground of loss. Here, on the contrary, the blockade is the sole ground of abandonment.

The abandonment itself, in the case now before the Court, is liable to objection. An abandonment, to be valid, ought to be made during the impediment that causes the loss. But in this case, the abandonment was not made till long after the impediment had ceased.

PINKNEY, *same side.*

It was contended by the Defendants in the Court below, that they were not liable for the loss in this case,

1st. Because, under the words of the policy, that loss did not arise from any peril insured against.

2d. Because the Plaintiffs had violated their warranty of neutrality.

3d. Because at the time when the abandonment was made, the property was not under the restraint of princes.

The same grounds of defence are now relied upon.

And, first, as to the words of the policy. This instrument insures against '*unlawful* arrests, restraints and detainments of all kings, &c. The word '*unlawful*' is that which the Defendants consider as taking the present case out of the policy. This word is not inserted in the English policies, but has been introduced into those of the Marine Insurance Company and some other American offices. Some meaning must be given to the term, and that can be no other than the most usual meaning; so that unless it can be made to appear that the detainment in this case was *unlawful*, the Defendants cannot be considered as liable. But, as has been said before, the blockade, which was the cause of the detainment, was lawful; the detainment itself was therefore lawful, under the acknowledged law of nations.

2d. As to the warranty of neutrality. p: 63

When the voyage was undertaken, and the policy underwritten, neither party knew that the port of destination was blockaded; but the underwriters protected themselves by a warranty of neutrality, and the assured consented to give it.

The import of the warranty is that the voyage shall be performed in a neutral manner; and, consequently, that if the vessel should find the port blockaded, she will discontinue the voyage. She does find it blockaded; and not only physical force, but *the law of nations* and *the warranty* oblige her to forbear the completion of the voyage. She nevertheless attempts to enter the port, and that, too, after being warned off by the admiral commanding the blockading squadron. Has the assured in such a case, a right to set up the *compliance with his own warranty* as the foundation of a total loss, or of any loss? With such a warranty in the policy, can the underwriter be considered as engaging that, if the port of destination should be found blockaded, the voyage shall be completed? If such *is* his engagement, then he stipulates that the vessel shall violate the warranty; because without a violation of it,

she cannot reach her port of destination, if she finds it blockaded. It is plain that his undertaking is only for a *neutral* voyage ; and, therefore, that, the moment it becomes unneutral, the policy is discharged by force of the warranty acting upon the whole contract.

Cases upon the British *orders in council* are far less strong than this ; for they made no blockade acknowledged by the law of nations. Physical force was there every thing ; and neutral duties were not affected by them. But here, the neutral obligations of the vessel turn her back, and intercept her path, and extract the case out of the policy.

3d. Here was no restraint of princes. Restraint must be *physical ;* and an abandonment, to be of any avail, must be made during such restraint. In the present case the physical restraint continued but one day ; all afterwards was mere *moral* restraint, arising from the
p. 64 threat of capture and confiscation as prize of war. But | an *apprehension*, though just and reasonable, is not sufficient to justify an abandonment. 3, *Bos. and Pul.* 392, *Hadkinson v. Robinson.* 5, *Esp. Ca.* 50. 1, *Campbell, Black v. Hagen.* See, also, the case of
6, Mass. T. R. 118, where the Court decided that *apprehension* alone would not justify an abandonment ; and, also, that if the master, after being once warned off, had made another attempt to enter the blockaded port, it would have been barratry.

HARPER, *in reply.*

1st. With regard to the wording of the policy. It is unnecessary to examine what effect the term, ' unlawful,' may have upon the subsequent words, inasmuch as the declaration states the loss to have been occasioned by *men of war*, with which the word ' unlawful ' had no connexion. But if such examination be made, it will appear that this term applies only to the word ' *arrests,*' which, in the original printed form of the policy, was separated from the following part of the sentence by a comma, and was therefore the only word qualified by the preceding term ' *unlawful.*' The pointing of the sentence was the act of the parties, and, as such, material, and as much a part of the contract as the words themselves.

2d. As to the violation of the warranty of neutrality. The loss was complete before the second attempt to enter the blockaded port ; and therefore could not have happened by reason of that attempt ; consequently, the right of the Plaintiffs to recover, could not be affected by that or any other act of the master, subsequent to the original loss, however inconsistent with neutrality that act might be.

3d. With regard to the time of abandoning : the Plaintiffs abandoned immediately after the arrival of the Cordelia at Philadelphia, which gave them the first information of the loss. To have expected them

to abandon before they knew any thing of the loss would have been absolutely inconsistent with reason.

The cases cited from *Bos. and Pul.* and the *Mass. T. R.* are essentially different from the present, inasmuch | as in those cases, there was no p. 65
physical force to prevent the prosecution of the voyage. *Park.* 226, (*6th Ed.*) *Blacketshager v. the London Assurance Company.*

Monday, February 21st....Present all the Judges.

STORY, *J.* after stating the facts of the case, delivered the opinion of the Court as follows:

The Court below, at the trial, held that the Plaintiff, under the circumstances, was not entitled to abandon as for a total loss; and the correctness of that opinion remains for the decision of this Court.

Whether the turning away of a ship from the port of destination in consequence of a blockade, be, in any case, a good cause for abandonment, so as to entitle the assured to recover from the underwriter as for a total loss by the breaking up of the voyage; and, if so, whether the doctrine could apply to a policy with a warranty of neutrality, the legal effect of such warranty being to compel the party to abandon the voyage, if it cannot be pursued consistent with neutrality, are questions of great importance, upon which the Court do not think it necessary to express any opinion, because this cause may well be decided upon an independent ground.

The loss of the voyage, in the case at bar, was occasioned (if at all) by the arrest and restraint of the British blockading squadron. The right to blockade an enemy's port with a competent force, is a right secured to every belligerent by the law of nations. No neutral can, after knowledge of such blockade, lawfully enter, or attempt to enter, the blockaded port. It would be a violation of neutral character, which, according to established usages, would subject the property engaged therein to the penalty of confiscation. In such a case, therefore, the arrest and restraint of neutral ships attempting to enter the port is a *lawful* arrest and restraint by the blockading squadron. It would follow, therefore, from this consideration, that the arrest and restraint, on account of which a recovery is now sought, is not a risk within the policy against which the underwriter has engaged to indemnify the Plaintiff. |

But it is contended by the counsel for the Plaintiff, in order to escape p. 66
from this conclusion, that the word 'unlawful,' in the policy, is confined in its operation to *arrests*, and does not extend to 'restraints and detainments.' To this construction the Court cannot assent. The grammatical order of the words and the coherence of the sentence require a different construction. It is not against every 'unlawful arrest' that the underwriter undertakes to indemnify, but against 'unlawful arrests, &c. of all

kings, princes, and people,' which have always been held to mean the arrests of kings, princes, or people, in their sovereign and national capacity, and not as individuals. The necessary connexion of the sentence, therefore, requires that 'arrests, restraints and detainments,' should be coupled together; and, if so, the qualification of *unlawful* must be annexed to them all. The intent of the parties, also, urges to the same conclusion; for every arrest is a restraint and detainment; and it would be strange if the party could, under the allegation of a restraint, recover a loss from which the underwriter is expressly exempted by an unambiguous exception in the policy.

On the whole, the Court are of opinion that the judgment of the Circuit Court must be affirmed.

Armitz Brown v. The United States.

(8 Cranch, 110) 1814.

British property found in the United States, on land, at the commencement of hostilities with Great Britain, cannot be condemned as enemy's property, without a legislative act, authorising its confiscation. The act of the legislature, declaring war, is not such an act. Timber, floated into a salt water creek where the tide ebbs and flows, leaving the ends of the timber resting on the mud at low water, and prevented from floating away at high water by booms, is to be considered as landed.

THIS was an appeal from the sentence of the Circuit Court of Massachusetts, which condemned 550 tons of pine timber, claimed by Armitz Brown, the Appellant.

D. DAVIS, *for the Appellant.*

This is an appeal from the Circuit Court of Massachusetts, in which Court, the property consisting of about 550 tons of pine timber, twelve thousand staves, and eighteen tons of lathwood, were condemned. The libel states, that this cargo was loaded on board the *Emulous*, at Savannah, April 9th, 1812; that the cargo belonged to British subjects; that the ship departed for Plymouth, in England April 18th, in the same year, and put into New Bedford for repairs; and that the cargo was there unladen, and remained there until seized by Delano, as well on his own behalf, as on behalf of the United States. As to some of the allegations in the libel, there is no evidence whatever to support them; the ship never departed for Plymouth, never put into New Bedford *for repairs*. The facts are these:

The property in question was the cargo of the American ship Emulous, and was seized as enemy's property, about the 5th of April, A. D. 1813, nearly a year after the same had been discharged from the ship. From the transcript in the case, it appears that the Emulous was owned by John Delano and others, citizens of the United States; that, in

February, 1812, the owners, by their | agent, chartered the ship to Elijah p. 111
Brown, as agent for Christopher Ide, Brothers and Co. and James Brown, British merchants ; that, by the charter party, the ship was to proceed from Charleston, S. C. where she then lay, to Savannah, and there take on board a cargo of lumber, at a certain freight stipulated in the charter party, and proceed with the same to Plymouth, in England, to unload there, or at any other of his Britannic majesty's dock-yards in England. The ship proceeded to Savannah, took on board the cargo mentioned in the libel, and was there stopped by the embargo of the 4th of April, 1812. On the 25th of the same month of April, it was agreed between the master of the ship and the agent of the shippers, that the ship should proceed to New Bedford, where she was owned, with the cargo, and remain there, without prejudice to the charter party ; which agreement is endorsed upon the back of the charter party. The ship accordingly proceeded to New Bedford, and remained there until the latter part of May following, when the cargo was finally unladed and discharged from the ship. The staves and lathwood were landed and put on a wharf. The timber was put into a salt water creek, which is not navigable, but where the tide ebbs and flows, and where the timber remained for safe keeping until the time of the seizure. The timber was secured in this creek by booms extended across the entrance thereof, and fastened by stakes driven into the flats. On the 7th of November, 1812, the property was sold to the claimant by E. Brown, the agent, in pursuance of the authority which he had for that purpose as agent of the shippers, and in pursuance of the advice of Delano, who afterwards seized it in the manner and for the purposes stated in the libel. This sale, the Appellant contends was made *bona fide* for a valuable consideration, which has since been paid, and after notice thereof given to Delano, in whose possession the property then was. The seizure was not made until five months after the property had been sold to the present claimant, and nearly twelve months after it was discharged from the ship. The claimant, it is admitted, is a citizen of the United States. E. Brown, the agent, by whom the property was sold, is a citizen of the United States, and James Brown, one of the owners of the cargo, is also a citizen of the United States, but resides in London and carries on trade and commerce in that city. |

Upon these facts, the principal point which will be contended for by p. 112
the counsel for the claimants is, *that this property was lawfully acquired, before the declaration of war by the United States against Great Britain ; and that, it being found here at the time of the breaking out of the war, under the faith of the government, it is not, by the modern law of nations, nor by any law of the United States, liable to confiscation.*

This question ought not to be decided upon the *rigorous* principles

and the *ancient* practice of the law of nations; but according to the *mitigated* law of war, sanctioned by modern usage in civilized nations: For when the government of the United States was organized and finally established, it was not only its true policy, but its duty, 'to receive the law of nations in its modern state of purity and refinement.' *Per Judge Wilson* in the case of *Ware v. Hylton*, 3 *Dall.* 281. It is contended by the counsel for the claimant in this case, that the *principle* and the *usage* adopted and sanctioned by the modern law of nations, is this, 'that enemy's property found in this country at the breaking out of a war, is not liable to confiscation.' A different practice, said to have prevailed in Great Britain with regard to property in this situation, found afloat in their ports and harbors, will be hereafter considered.

The rule of the law of nations applicable to this case, is found in *Vattel, p.* 477. His words are, 'The sovereign declaring war, can neither 'detain the persons nor the *property* of those subjects of the enemy 'who are within his dominions at the time of the declaration. They 'came into his country under *the public faith.* By permitting them to 'enter and reside in his territories, he tacitly promised them full liberty 'and security for their return. He is therefore bound to allow them a 'reasonable time for withdrawing with their effects; and if they stay 'beyond the time prescribed, he has a right to treat them as enemies, 'though as enemies unarmed. But if they are detained by an insur-'mountable impediment, as by sickness, he must necessarily and for 'the same reason grant them a sufficient extension of the term.' In order to shew the humane and liberal spirit with which the above rule
p. 113 is adopted by | sovereigns in modern times, the same author adds, 'At 'present, so far from being wanting in this duty, sovereigns carry their 'attention to humanity *still further;* so that foreigners who are subjects 'of the state against which war is declared, are frequently allowed full 'time for the settlement of their affairs.'

Are not these just and equitable rules of the modern law of nations of authority in the Judicial Courts of the United States? Upon what principle or policy, are they to be rejected, and those of an age dark, and even barbarous in comparison with the present, adopted in their stead? Does it comport with the interest and character of this government, to *reject* principles and usages, calculated to ameliorate and mitigate the state of war and to promote the interest of commerce, which it appears have been *chearfully adopted* by all the *monarchies* of Europe? The contract which was entered into by the agents of the parties in this case, was made upon the presumption that, in case of war, the property would be safe. This presumption arose from the uniform practice, in similar cases, in all countries upon which the law of nations is binding.

It has been suggested that this rule in *Vattel* is applicable only to

such *persons* as may happen to be in the country at the time of the declaration of war. Such, indeed, is the *letter* of the rule: But when there is the same reason, there is the same law; and no good reason can be assigned why the property of an *absent owner* should not be protected, as well as that of those who may happen to be resident in the country declaring war. In addition to this, it may be observed, that the owners of this property were, in law, present during the whole negotiation relative to this cargo, by their agent, E. Brown, by whom it was purchased, and who had the whole care and charge of it, at the time that war was declared.

If the correctness or authority of *Vattel* should be questioned, he will be found to be supported by other writers of high character.

In *Chitty's Law of Nations, p.* 67, it is thus written: 'In strict justice, 'the right of seizure can take effect | only on those possessions of the p. 114
'belligerent, which have come to the hands of his adversary *after the* '*declaration of war.*' And again, in p. 80, 'Such appears to be, at present, 'the *law* and *practice* of civilized nations, with respect to hostile property '*found within their dominions at the breaking out of war.*' These opinions are not only fairly collected from modern writers upon the law of nations, but are entitled to particular respect as coming from a man of high character for his professional talents, and legal science; and who has done and written more to improve and reduce to system the common law of England, than any other writer upon that subject for the last thirty years.

The principles and practice of the modern law of nations here advocated, will also be found conformable to the common law. In *Magna Charta,* that venerable foundation of English law and liberty, it is provided, that merchant strangers in the realm of England at the beginning of a war, shall be protected from harm in body and goods, until it shall be made known to the high authorities of the nation, how British merchants should be treated in the enemy's country, and they were to be dealt with according to such treatment. *Magna Charta, chap.* 30. These provisions are commented upon, and emphatically eulogised by *Montesquieu, 2d vol. p.* 12.

Of similar character were the provisions of an ancient English statute, passed 27 *Edwd.* 3, *Stat.* 2, *chap.* 17, in which it is enacted, 'that in case 'of war, merchants shall not be sent suddenly out of the kingdom, 'but may go out of the kingdom freely, with their goods, within forty 'days, and shall not be in any thing hindered or disturbed in their pas-'sage, *or to make profit of their merchandize if they wish to sell them;* or, 'if in default of wind or ship, or any other adverse cause, they cannot 'go, they shall have other forty days, within which time they shall pass '*with their merchandize, or sell the same as before.*'

It is respectfully contended, that no act or measure of the American government has ever indicated a disposition adverse to those humane and liberal provisions and usages of the common law, and of the law of
p. 115 nations. On the contrary, so far as the disposition and policy of | the government may be discerned by implication, it has manifested its entire acquiescence in, and its readiness to adopt them upon all proper occasions. The spirit and disposition of the government upon this subject, is apparent from the provisions in (I believe it may be said) *every treaty* which has been entered into since the establishment of the government. Articles for the protection and removal of the property of enemies found in this country at the breaking out of a war, are found in our treaties with France, Spain, Holland, Sweden, Prussia, Morocco, England and *Algiers*. It will not be contended, that the provisions of these treaties, especially that with England, can be binding, when the treaties themselves are not in force; but the uniform practice of those governments, in agreeing to these provisions, is evidence of the highest nature, that the government of the United States have adopted, and mean to adhere to the modern law of nations in this respect; that it approves the liberality of the modern usages, and *rejects*, and, I hope I may add, *abhors* the *rigorous* rules and contracted principles of the ancient jurists; that the spirit of the government, and the character of its policy, is to cherish and carry into practice every principle and every custom and usage, which is found favorable to commerce, and which will mitigate the evils incident to a state of war.

In the proceedings and measures of the government *since the war*, there can be found no expression of its will, that property in the situation of this cargo, should be confiscated or claimed for the use of the government—on the contrary, there are indications of another and more benign complexion. By the *act of July 6th*, 1812, *sect.* 6, the president was authorized, within six months from the date of the act, 'to 'give passports for the safe transportation of any ship or property 'belonging to British subjects, then within the limits of the United 'States.' Nothing, therefore, can be more clear, than that it was not the wish or intention of government, to claim or confiscate property, belonging to the enemy, then in the United States. If such had been its policy, instead of the liberal provisions of this statute, provision would have been made in this statute, or in the act declaring war, not
p. 116 only expressive | of the public will upon this subject, but expressly declaring British property then within the United States liable to confiscation.

By the provisions of this statute, it is apparent that if this property had been on board a *British* ship, or if a British ship had been found in which to transport it, it would have come directly within the authority

of the president, as to its safe transportation. Surely, then, it could never have been the intention of Congress to have it confiscated upon the ground that it had been lawfully on board an American ship, in the regular course of trade, was there arrested by the embargo, and then, for the convenience of all parties, discharged from the ship, and placed in a proper situation for safe keeping, to abide the events of the embargo and the war.

The Court will also notice, that, previous to the expiration of the six months allowed by the act of congress, above quoted, for the exportation of British property, this cargo had been sold with the knowledge and approbation of the Libellant. This transfer, having been made *bona fide*, conferred other and new rights upon a third party, viz: the present Claimant. The principle quoted and relied upon, that that transfer was void upon the ground that it was made by an alien enemy in time of war, was probably never contemplated or known by the parties to the contract; and this may furnish a *satisfactory*, though perhaps not strictly a *legal* reason, why this property was not exported under the president's passport. At any rate, if the Court should be satisfied that this property is not liable to confiscation, either by the law of nations or by any act of congress, they will not trouble themselves about the effect of the transfer, but leave the parties interested to settle that matter among themselves.

Before the Court will condemn this property, they will search for some proof of a decided intention, on the part of the government, that such property should be confiscated. It appears that all the acts of congress, so far as they can be interpreted with reference to this question, manifest a contrary spirit. The act declaring | war, speaks no language p. 117
adverse to the claim of the Appellant. The prize act of the 26th of June, 1812, does not even glance at property in this situation. Will the Court assume the power, *by implication*, to condemn the property; and this, too, against the most explicit declarations of the public will, so far as they can be collected from measures of an analogous nature? Why is this case singled out? Why do not the district attornies enter the warehouses in the numerous sea-ports, and hunt for booty of this description? Such a proceeding would be as legal and as *liberal* as the present, though probably attended with serious mischief to the country, if retaliatory proceedings and measures should be adopted by the enemy; for it is a well known fact, that the amount of American property in England at the commencement of the war, was *immensely* greater than that of English property in America, at the same period.

It was stated, in the argument below, that the question relative to the confiscation of debts, or *choses* in action, is illustrative of that which relates to the confiscation of goods. The modern usage and law of

nations, and of our own country, relative to the confiscation of debts, are equally favorable to the Claimant in this case.

In the first place, it is distinctly denied, that there exists any power to confiscate the private debts of the enemy, excepting by a positive act of Congress. What figure would the attorney of the United States make, with a libel in the judicial Courts, praying for a confiscation of a private debt? The exclusive right of this kind of confiscation, and even of goods, is in the legislature—per *Chase, Justice*, in the case of *Ware v. Hylton*, 3, *Dall.* 281. The question which has been discussed by the writers upon the law of nations, is, whether it be lawful for the *sovereign* thus to confiscate. And although it is admitted that he *may* do it, yet, 'in regard to the safety of commerce, all the sovereigns of Europe *have* 'departed from this rigor'; and as this *custom* has been generally received, 'he who would act contrary to it, would *injure the public faith*; for 'strangers trusted his subjects upon the presumption that the *general* p. 118 'custom would prevail.' *Vattel, lib.* 3, *ch.* | 5, *sect.* 77. The laws and customs of the United States ought to be so expounded as to conform to the modern law of nations, which is *adverse* to the confiscating of debts. Indeed the confiscation of debts has become *disreputable;* and it has been *feelingly* observed by a late learned judge of this Court, that 'not 'a single confiscation of this kind *stained the code of any European power* 'engaged in the war which our revolution produced'—3, *Dall.* 281.

It will be admitted that the question relative to the confiscation of debts, or *choses* in action, is illustrative of the question relative to the confiscation of the private property of an enemy, found here under the faith of government at the breaking out of the war. Indeed the law and practice is, and ought to be, the same in both cases; and until a law of congress shall be produced, confiscating property of this description, the judicial Courts will not only proceed to do it with great reluctance, but will never assume an authority of that kind, unless furnished with it by a legislative act, any more than in the confiscation of a private debt. In addition to all this, it seems to be now perfectly settled by the modern law and practice of nations, that debts are never to be confiscated; that it has become a disgraceful act in any government that does it; that these debts are *suspended*, and the right to recover them necessarily taken away by the war; but that upon the return of peace, the debts are revived, and the right to recover them perfectly restored.

The condemnation of this property is demanded upon the ground that the embargo of the 4th of April, 1812, arrested and detained it until the act of congress took place declaring war; and that *that* act had a retroactive effect, and justifies the condemnation of this property. But to this it is answered: the embargo of the 4th of April was not a hostile, but a civil embargo; and no such construction was ever given to an

embargo, not of a hostile character. That this embargo was not of this character is most manifest from this, that express provision was made for the departure of any foreign ships or vessels, either in ballast or with the goods, wares and merchandize, on board of such foreign ship or vessel when notified of the act. It was, therefore, the | being laden on p. 119
board a vessel of the United States that prevented the departure of this property. If it had been on board a foreign, even a British, ship, it would not have been detained. That it was actually laden on board, at the time of the notice of the embargo, manifestly appears from the record. This, it is conceived, is a sufficient answer to the claim of the government to this property, upon the ground that it was stopped by the embargo, and liable to confiscation by the retroactive operation of the act of congress declaring war. The authorities in support of the principles here contended for, respecting the difference between hostile and civil embargoes, must be familiar to the Court, and need not be cited.

But the practice of the British government is relied upon as a rule by which the Court are to be governed in the present case. It is admitted that the English Courts of admiralty have condemned *vessels detained in port* by an embargo, and found there at the breaking out of hostilities: but it is explicitly denied that they have ever condemned property found on land, in that situation. 1 *Rob.* 228.

If, however, the English Courts of admiralty have done wrong, and proceeded against the modern law of nations in these cases, this honorable Court will not, *for that reason*, adopt so unjust a practice. The condemnation of property, arrested in the ports of Great Britain by an embargo, to which a hostile character is afterwards given by a subsequent declaration of war, appears to be a departure from the modern usages of nations, and cannot be justified by or reconciled with the spirit of those usages. But as they have never condemned property in this situation, except such as has been found not only afloat, but in *vessels detained in their ports by an embargo*, their decisions can form no precedent in this case; for the property which is the subject of this prosecution, was either on land, or in such a situation as that it could not be the subject upon which an embargo could operate; or, in other words, the staves and lathwood were literally on the land; and the pine timber so discharged from the ship and so deposited, as to be entitled to the same protection as if actually landed and stored. |

The rule adopted in the English Court of Admiralty, as laid down p. 120
in 2 *Rob.* 211, is this: 'All *vessels* detained in port, and found there at the breaking out of hostilities, are condemned, *jure coronæ*, to the king; and all coming in after hostilities, not voluntarily by revolt, but ignorant of the war, are condemned as *droits of admiralty*. This rule, both in its

import and application, has been adopted, it is conceived, only in cases of *vessels and their cargoes found in the ports* of Great Britain. There can be no reason for their application in this country to property found on the land, or to property, although waterborne yet, in the same situation, in reason and in fact, as if found *literally* on land.

Of this description is the property in question. By referring to the record, particularly the depositions of E. Brown and of Silas Allen, the condition of this property, from the time it was discharged from the ship to the time it was seized by Delano, may be learned, from whence it will appear that the allegation in the libel, that the property was on the high seas, is wholly without foundation. The staves and lathwood were *landed* and on a *wharf*. With respect to these, there can be no doubt. The timber was discharged from the ship in the month of May, previous to the declaration of war; it is of such description that it did not admit of being *stored;* it would have been injured by lying on the land; and the only place proper to keep it in, was the one selected, a creek, or small cove, where the tide ebbs and flows, but which was not navigable even for boats or scows; for it seems it was necessary to clear it out to admit a scow into it. Moreover, it was necessary to secure the entrance of this creek by booms or timber laid across its mouth, fastened by piles or stakes driven into the flats. This timber was thus secured and stored in the usual way in which property of this description is managed; and was, to all intents and purposes, as much lodged and *impounded* in this place, under a bailment, and in civil hands, (1 *Rob. p.* 228) as if it had been in a ship yard. It must, therefore, be a great stretch of power and prerogative to extend the reason of the practice of Great Britain in condemning property found in its harbors and on board vessels, to property in the situation of that in question: and unless the practice
p. 121 of Great Britain has extended to the seizure | and condemnation of enemies' property found on land at the time of breaking out of hostilities, no sanction can be derived from her practice in favor of the confiscation of this property.

The case, was submitted by the *Attorney General* upon the argument contained in the opinion of the honorable judge Story, in the Circuit Court, which came up in the transcript of the record.

Wednesday, March 2d. Present....All the Judges.

MARSHALL, *Ch. J.* delivered the opinion of the Court, as follows:

The material facts in this case are these:

The *Emulous* owned by John Delano and others, citizens of the United States, was chartered to a company carrying on trade in Great Britain, one of whom was an American citizen, for the purpose of carrying a cargo from Savannah to Plymouth. After the cargo was put on board, the

vessel was stopped in port by the embargo of the 4th of April, 1812. On the 25th of the same month, it was agreed between the master of the ship and the agent of the shippers, that she should proceed with her cargo to New Bedford, where her owners resided, and remain there without prejudice to the charter party. In pursuance of this agreement, the Emulous proceeded to New Bedford, where she continued until after the declaration of war. In October or November, the ship was unloaded and the cargo, except the pine timber, was landed. The pine timber was floated up a salt water creek, where, at low tide, the ends of the timber rested on the mud, where it was secured from floating out with the tide, by impediments fastened in the entrance of the creek. On the 7th of November, 1812, the cargo was sold by the agent of the owners, who is an American citizen, to the Claimant, who is also an American citizen. On the 19th of April, a libel was filed by the attorney for the United States, in the district Court of Massachusetts, against the said cargo, as well on behalf of the United States of America as for and in behalf of John Delano and of all other persons concerned. It does not appear | that p. 122
this seizure was made under any instructions from the president of the United States; nor is there any evidence of its having his sanction, unless the libels being filed and prosecuted by the law officer who represents the government, must imply that sanction.

On the contrary, it is admitted that the seizure was made by an individual, and the libel filed at his instance, by the district attorney who acted from his own impressions of what appertained to his duty. The property was claimed by Armitz Brown under the purchase made in the preceding November.

The district Court dismissed the libel. The Circuit Court reversed this sentence, and condemned the pine timber as enemy property forfeited to the United States. From the sentence of the Circuit Court, the Claimant appealed to this Court.

The material question made at bar is this. Can the pine timber, even admitting the property not to be changed by the sale in November, be condemned as prize of war?

The cargo of the Emulous having been legally acquired and put on board the vessel, having been detained by an embargo not intended to act on foreign property, the vessel having sailed before the war, from Savannah, under a stipulation to re-land the cargo in some port of the United States, the re-landing having been made with respect to the residue of the cargo, and the pine timber having been floated into shallow water, where it was secured and in the custody of the owner of the ship, an American citizen, the Court cannot perceive any solid distinction, so far as respects confiscation, between this property and other British property found on land at the commencement of hostilities. It will

therefore be considered as a question relating to such property generally, and to be governed by the same rule.

Respecting the power of government no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations |
p. 123 of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall chuse to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the Court.

The questions to be decided by the Court are :

1st. May enemy's property, found on land at the commencement of hostilities, be seized and condemned as a necessary consequence of the declaration of war ?

2d. Is there any legislative act which authorizes such seizure and condemnation ?

Since, in this country, from the structure of our government, proceedings to condemn the property of an enemy found within our territory at the declaration of war, can be sustained only upon the principle that they are instituted in execution of some existing law, we are led to ask,

Is the declaration of war such a law ? Does that declaration, by its own operation, so vest the property of the enemy in the government, as to support proceedings for its seizure and confiscation, or does it vest only a right, the assertion of which depends on the will of the sovereign power ?

The universal practice of forbearing to seize and confiscate debts and credits, the principle universally received, that the right to them revives on the restoration of peace, would seem to prove that war is not an absolute confiscation of this property, but simply confers the right of confiscation.

Between debts contracted under the faith of laws, and property acquired in the course of trade, on the faith of the same laws, reason draws no distinction ; and, although, in practice, vessels with their cargoes, found in port at the declaration of war, may have been seized, it is not believed that modern usage would sanction the seizure of the goods of an
p. 124 enemy on land, which | were acquired in peace in the course of trade. Such a proceeding is rare, and would be deemed a harsh exercise of the rights of war. But although the practice in this respect may not be uniform, that circumstance does not essentially affect the question. The enquiry is, whether such property vests in the sovereign by the mere declaration of war, or remains subject to a right of confiscation, the exercise of which depends on the national will : and the rule which applies

to one case, so far as respects the operation of a declaration of war on the thing itself, must apply to all others over which war gives an equal right. The right of the sovereign to confiscate debts being precisely the same with the right to confiscate other property found in the country, the operation of a declaration of war on debts and on other property found within the country must be the same. What then is this operation?

Even *Bynkershoek*, who maintains the broad principle, that in war every thing done against an enemy is lawful; that he may be destroyed, though unarmed and defenceless; that fraud, or even poison, may be employed against him; that a most unlimited right is acquired to his person and property; admits that war does not transfer to the sovereign a debt due to his enemy; and, therefore, if payment of such debt be not exacted, peace revives the former right of the creditor; 'because,' he says, 'the occupation which is had by war consists more in fact than in 'law.' He adds to his observations on this subject, 'let it not, however, 'be supposed that it is only true of actions, that they are not condemned '*ipso jure*, for other things also belonging to the enemy may be concealed 'and escape condemnation.'

Vattel says, that 'the sovereign can neither detain the persons nor the 'property of those subjects of the enemy who are within his dominions 'at the time of the declaration.'

It is true that this rule is, in terms, applied by *Vattel* to the property of those only who are personally within the territory at the commencement of hostilities; but it applies equally to things in action and to things in possession; and if war did, of itself, without any further exercise of the sovereign will, vest the property of the | enemy in the sovereign, his p. 125
presence could not exempt it from this operation of war. Nor can a reason be perceived for maintaining that the public faith is more entirely pledged for the security of property trusted in the territory of the nation in time of peace, if it be accompanied by its owner, than if it be confided to the care of others.

Chitty, after stating the general right of seizure, says, 'But, in strict 'justice, that right can take effect only on those possessions of a belli-'gerent which have come to the hands of his adversary after the de-'claration of hostilities.'

The modern rule then would seem to be, that tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated; and in almost every commercial treaty an article is inserted stipulating for the right to withdraw such property.

This rule appears to be totally incompatible with the idea, that war does of itself vest the property in the belligerent government. It may be considered as the opinion of all who have written on the *jus belli*, that

war gives the right to confiscate, but does not itself confiscate the property of the enemy; and their rules go to the exercise of this right.

The constitution of the United States was framed at a time when this rule, introduced by commerce in favor of moderation and humanity, was received throughout the civilized world. In expounding that constitution, a construction ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess elsewhere, and which would fetter that exercise of entire discretion respecting enemy property, which may enable the government to apply to the enemy the rule that he applies to us.

If we look to the constitution itself, we find this general reasoning much strengthened by the words of that instrument.

p. 126 That the declaration of war has only the effect of | placing the two nations in a state of hostility, of producing a state of war, of giving those rights which war confers; but not of operating, by its own force, any of those results, such as a transfer of property, which are usually produced by ulterior measures of government, is fairly deducible from the enumeration of powers which accompanies that of declaring war. 'Congress 'shall have power'—'to declare war, grant letters of marque and 'reprisal, and make rules concerning captures on land and water.'

It would be restraining this clause within narrower limits than the words themselves import, to say that the power to make rules concerning captures on land and water, is to be confined to captures which are exterritorial. If it extends to rules respecting enemy property found within the territory, then we perceive an express grant to congress of the power in question as an independent substantive power, not included in that of declaring war.

The acts of congress furnish many instances of an opinion that the declaration of war does not, of itself, authorize proceedings against the persons or property of the enemy found, at the time, within the territory.

War gives an equal right over persons and property: and if its declaration is not considered as prescribing a law respecting the person of an enemy found in our country, neither does it prescribe a law for his property. The act concerning alien enemies, which confers on the president very great discretionary powers respecting their persons, affords a strong implication that he did not possess those powers by virtue of the declaration of war.

The 'act for the safe keeping and accommodation of prisoners of war,' is of the same character.

The act prohibiting trade with the enemy, contains this clause:

'And be it further enacted, That the president of the United States 'be, and he is hereby authorized to give, at any time within six months

p. 127 'after the passage | of this act, passports for the safe transportation of

'any ship or other property belonging to British subjects, and which is 'now within the limits of the United States.'

The phraseology of this law shows that the property of a British subject was not considered by the legislature as being vested in the United States by the declaration of war; and the authority which the act confers on the president, is manifestly considered as one which he did not previously possess.

The proposition that a declaration of war does not, in itself, enact a confiscation of the property of the enemy within the territory of the belligerent, is believed to be entirely free from doubt. Is there in the act of congress, by which war is declared against Great Britain, any expression which would indicate such an intention?

That act, after placing the two nations in a state of war, authorizes the president of the United States to use the whole land and naval force of the United States to carry the war into effect, and 'to issue to private 'armed vessels of the United States, commissions or letters of marque 'and general reprisal against the vessels, goods and effects of the govern- 'ment of the united kingdom of Great Britain and Ireland, and the 'subjects thereof.'

That reprisals may be made on enemy property found within the United States at the declaration of war, if such be the will of the nation, has been admitted; but it is not admitted that, in the declaration of war, the nation has expressed its will to that effect.

It cannot be necessary to employ argument in showing that when the attorney for the United States institutes proceedings at law for the confiscation of enemy property found on land, or floating in one of our creeks, in the care and custody of one of our citizens, he is not acting under the authority of letters of marque and reprisal, still less under the authority of such letters issued to a private armed vessel. |

The 'act concerning letters of marque, prizes and prize goods,' p. 128
certainly contains nothing to authorize this seizure.

There being no other act of congress which bears upon the subject, it is considered as proved that the legislature has not confiscated enemy property which was within the United States at the declaration of war, and that this sentence of condemnation cannot be sustained.

One view, however, has been taken of this subject which deserves to be further considered.

It is urged that, in executing the laws of war, the executive may seize and the Courts condemn all property which, according to the modern law of nations, is subject to confiscation, although it might require an act of the legislature to justify the condemnation of that property which, according to modern usage, ought not to be confiscated.

This argument must assume for its basis the position that modern

usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power. This position is not allowed. This usage is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded.

The rule is, in its nature, flexible. It is subject to infinite modification. It is not an immutable rule of law, but depends on political considerations which may continually vary.

Commercial nations, in the situation of the United States, have always a considerable quantity of property in the possession of their neighbors. When war breaks out, the question, what shall be done with enemy property in our country, is a question rather of policy than of law. The rule which we apply to the property of our enemy, will be applied by him
p. 129 to the property of | our citizens. Like all other questions of policy, it is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary.

It appears to the Court, that the power of confiscating enemy property is in the legislature, and that the legislature has not yet declared its will to confiscate property which was within our territory at the declaration of war. The Court is therefore of opinion that there is error in the sentence of condemnation pronounced in the Circuit Court in this case, and doth direct that the same be reversed and annulled, and that the sentence of the District Court be affirmed.

STORY, *J.*

In this case, I have the misfortune to differ in opinion from my brethren; and as the grounds of the decree were fully stated in an opinion delivered in the Court below, I shall make no apology for reading it in this place.

'This is a prize allegation filed by the district attorney, in behalf of the United States, and of John Delano, against 550 tons of pine timber, part of the cargo of the American ship Emulous, which was seized as enemies' property, about the 5th day of April, 1813, after the same had been discharged from said ship, and while afloat in a creek or dock at New Bedford, where the tide ebbs and flows.

From the evidence in this case, it appears that the ship Emulous is owned by the said John Delano, John Johnson, Levi Jenny, and Joshua Delano of New Bedford, and citizens of the United States. On the 3d day of February 1812, the owners, by their agents, entered into a charter-party with Elijah Brown as agent of Messrs. Christopher Idle, Brother and Co.

and James Brown, of London, merchants, for said ship, to proceed from the port of Charleston, South Carolina, (where the ship then lay,) to Savannah, in Georgia, and there take on board a cargo of timber and staves, at a certain | freight stipulated in the charter-party, and proceed with the p. 130
same to Plymouth, in England, 'for orders to unload there or at any other of his majesty's dock-yards in England.' The ship accordingly proceeded to Savannah, took on board the agreed cargo, and was there stopped by the embargo laid by Congress on the 4th of April 1812. On the 25th of the same April, it was agreed between Mr. E. Brown and the master of the ship, that she should proceed with the cargo to, and lay at New Bedford, without prejudice to the charter-party. The ship accordingly proceeded for New Bedford, and arrived there in the latter part of May 1812, where, it seems, the cargo was finally, but the particular time is not stated, unloaded by the owners of the ship, the staves put into a warehouse, and the timber into a salt water creek or dock, where it has ever since remained, waterborne, under the custody of said John Delano, by whom the subsequent seizure was made, for his own benefit and the benefit of the United States. On the 7th November, 1812, Mr. Elijah Brown, as agent for the British owners, (one of whom, James Brown, is his brother,) sold the whole cargo to the present claimant, Mr. Armitz Brown (who it should seem is also his brother) for 2433 dollars and 67 cents, payable in nine months, for which the claimant gave his note accordingly. The master of the ship, Capt. Allen, swears that, at the time of entering into the charter-party, Mr. Elijah Brown stated to him that the British owners had contracted with the British government to furnish a large quantity of timber to be delivered in some of his majesty's dock-yards.

Besides the claim of Mr. Brown, there is a claim interposed by the owners of the ship Emulous, praying for an allowance to them of their expenses and charges in the premises.

A preliminary exception has been taken to the libel for a supposed incongruity in blending the rights of the United States and of the informer in the manner of a *qui tam* action at the common law.

I do not think this exception is entitled to much consideration. It is, at most, but an irregularity which cannot affect the nature of the proceedings, or oust the jurisdiction of this Court. If the informer cannot legally | take any interest, the United States have still a right, if their p. 131
title is otherwise well founded, to claim a condemnation: Nor would a proceeding of this nature be deemed a fatal irregularity in Courts having jurisdiction of seizures, whose proceedings are governed by much more rigid rules than those of the admiralty. It is a principle clearly settled at the common law, that any person might seize uncustomed goods to the use of himself and the king, and thereupon inform of the seizure; and

if, in the exchequer, the informer be not entitled to any part, the whole shall, on such information, be adjudged to the king. For this doctrine we have the authority of lord Hale. *Harg. law tracts*, 227. And the solemn judgment of the Court, in *Roe v. Roe*, *Hardr.* 185.—and *Malden v. Bartlett*, *Parker*, 105. The same rule most undoubtedly exists in the prize Court, and, as I apprehend, applies with greater latitude. All property captured belongs originally to the crown; and individuals can acquire a title thereto in no other manner than by grant from the crown. *The Elsebe*, 5. *Rob.* 173.—11. *East*, 619.—*The Maria Francoise.* 6 *Rob.* 282. This, however, does not preclude the right to seize; on the contrary, it is an indisputable principle in the English prize Courts, that a subject may seize hostile property for the use of the crown, wherever it is found; and it rests in the discretion of the crown whether it will or will not ratify and consummate the seizure by proceeding to condemnation. But to the prize Court it is a matter of pure indifference whether the seizure proceeded originally from the crown, or has been adopted by it; and whether the crown would take *jure coronae*, by its transcendant prerogative, or *jure admiralitatis*, as a flower annexed by its grant to the office of lord high admiral. The cases of captures by non-commissioned vessels, by commanders on foreign stations, anterior to war, by private individuals in port or on the coasts, and by naval commanders on shore on unauthorised expeditions, are all very strong illustrations of the principle. *The Aquila*, 1. *Rob.* 37.—*The Twee Gesuster*, 2. *Rob.* 284, *note.*—*The Rebeckah*, 1. *Rob.* 227.—*The Gertruyda*, 2. *Rob.* 211.—*The Melomane*, 5. *Rob.* 41.—*The Charlotte*, 5. *Rob.* 282.—*The Richmond*, 5. *Rob.* 325.—*Thorshaven*, 1. *Edw.* 102.—*Hale in Harg. law tracts, ch.* 28. *p.* 245. And in cases where private captors seek condemnation to themselves, it is the
p. 132 settled course of the Court, on failure of their title, to decree | condemnation to the crown or the admiralty, as the circumstances require. *The Walsingham Packet*, 2. *Rob.* 77.—*The Etrusco*, 4. *Rob.* 262. *note.—and the cases cited supra.* Nor can I consider these principles of the British Courts a departure from the law of nations. The authority of *Puffendorf* and *Vattel* are introduced to shew that private subjects are not at liberty to seize the property of enemies without the commission of the sovereign, and if they do they are considered as pirates. But when attentively considered, it strikes me that, taking the full scope of these authors, they will not be found to support so broad a position. *Puff. B.* 8. *ch.* 6. § 21.—*Vattel*, *B.* 3. *ch.* 15. § 223, 224, 225, 226, 227. *Vattel* himself admits (§ 234,) that the declaration of war, which enjoins the subjects at large to attack the enemy's subjects, implies a general order; and that to commit hostilities on our enemy without an order from our sovereign after the war, is not a violation so much of the law of nations as of the public law applicable to the sovereignty of our own nation, (§ 225.) And he explicitly states,

(§ 226.) that, by the law of nations, when once two nations are engaged in war, all the subjects of the one may commit hostilities against those of the other, and do them all the mischief authorized by the state of war. All that he contends for is, that though, by the declaration, all the subjects in general are ordered to attack the enemy, yet that by custom this is usually restrained to persons acting under commission; and that the general order does not invite the subjects to undertake any offensive expedition without a commission or particular order; (§ 227.) and that if they do, they are not usually treated by the enemy in a manner as favorable as other prisoners of war, (§ 226.) And *Vattel* (§ 227) explicitly declares, that the declaration of war 'authorizes, indeed, and even obliges every subject, of whatever rank, to secure the persons and *things* belonging to the enemy, when they fall into his hands. And he then goes on to state cases in which the authority of the sovereign may be presumed, (§ 228.) The whole doctrine of Vattel, fairly considered, amounts to no more than this, that the subject is not required, by the mere declaration of war, to originate predatory expeditions against the enemy; that he is not authorized to wage war contrary to the will of his own sovereign; and that, though the ordinary declaration of war imports a general authority to attack the enemy | and his property, yet custom has p. 133
so far restrained its meaning, that it is in general confined to persons acting under the particular or constructive commission of the sovereign. If, therefore, the subject do undertake a predatory expedition, it is an infringement of the public law of his own country, whose sovereignty he thus invades, but it is not a violation of the law of nations of which the enemy has a right to complain. But if the property of the enemy *fall* into the hands of a subject, he is bound to secure it.

For every purpose applicable to the present case, it does not seem necessary to controvert these positions; and, whatever may be the correctness of the others, I am perfectly satisfied that the position is well founded, that no subject can legally commit hostilities, or capture property of an enemy, when, either expressly or constructively, the sovereign has prohibited it. But suppose he does, I would ask if the sovereign may not ratify his proceedings; and thus, by a retroactive operation, give validity to them? Of this there seems to me no legal doubt. The subject seizes at his peril, and the sovereign decides, in the last resort, whether he will approve or disapprove of the act. *Thorshaven*, 1, *Edw.* 102. The authority of *Puffendorf* is still less in favor of the position of the Claimant's counsel. In the section cited (*book* 8, *ch.* 6, *sec.* 21.) Puffendorf considers the question to whom property captured in war belongs; a question also examined by *Vattel* in the 229th section of the book and chapter above referred to. In the course of that discussion, Puffendorf observes, 'that it may be very justly questioned,

whether every thing taken in war, by *private hostilities*, and by the bravery of private subjects that have no commission to warrant them, belongeth to them that take it. For this is also a part of the war, to appoint what persons are to act in a hostile manner against the enemy, and how far: and, in consequence, no private person hath power to make devastations in an enemy's country or to carry off spoil or plunder without permission from his sovereign: and the sovereign is to decide how far private men, when they are permitted, are to use that liberty of plunder; and whether they are to be the sole proprietors in the booty or only to share a part of it: so that all a private adventurer in war can
p. 134 pretend to, is no more than | what his sovereign will please to allow him; for to be a soldier and to act offensively, a man must be commissioned by public authority.'

As to the point upon which Puffendorf here expresses his doubts, I suppose that no person, at this day, entertains any doubts. It is now clear, as I have already stated, that all captures in war enure to the sovereign, and can become private property only by his grant. But is there any thing in Puffendorf to authorize the doctrine, that the subject so seizing property of the enemy, is guilty of a very enormous crime—of the odious crime of piracy? And is there, in this language, any thing to show that the sovereign may not adopt the acts of his subjects, in such a case, and give them the effect of full and perfect ratification? It has not been pretended, that I recollect, that Grotius supports the position contended for. To me it seems pretty clear that his opinions lean rather the other way; viz: to support the indiscriminate right of captors to all property captured by them. *Grotius, lib.* 3, *ch.* 6, *sec.* 2, *sec.* 10, *sec.* 12. *Bynkershoek* has not discussed the question in direct terms. In one place (*Bynk. Pub. Juris, ch.* 3,) he says, that he is not guilty of any crime, by the laws of war, who invades a hostile shore in hopes of getting booty. It is true that, in another place (*id. ch.* 20,) he admits, in conformity to his doctrine elsewhere, (*id. ch.* 17,) that if an uncommissioned cruizer should sail for the purpose of making hostile captures, she might be dealt with as a pirate, if she made any captures except in self-defence. But this he expressly grounds upon the municipal edicts of his own country in relation to captures made by its own subjects. And he says, every declaration of war not only permits but expressly orders all subjects to injure the enemy by every possible means; not only to avert the danger of capture, but to capture and strip the enemy of all his property. And, looking to the general scope of his observations, (*id. ch.* 3, 4, *& ch.* 16 *&* 17.) I think it may, not unfairly, be argued that, independent of particular edicts, the subjects of hostile nations might lawfully seize each other's property wherever found: at least, he states nothing from which it can be inferred that the sovereign might not avail himself of property

captured from the enemy by uncommissioned subjects. On | the whole, p. 135
I hold that the true doctrine of the law of nations, found in foreign jurists, is, that private citizens cannot acquire to themselves a title to hostile property, unless it is seized under the commission of their sovereign; and that, if they depredate upon the enemy, they act upon their peril, and may be liable to punishment, unless their acts are adopted by their sovereign. That, in modern times, the mere declaration of war is not supposed to clothe the citizens with authority to capture hostile property, but that they may lawfully seize hostile property in their own defence, and are bound to secure, for the use of the sovereign, all hostile property which falls into their hands. If the principles of British prize law go further, I am free to say that I consider them as the law of this country.

I have been led into this discussion of the doctrine of foreign jurists, farther than I originally intended; because the practice of this Court in prize proceedings must, as I have already intimated, be governed by the rules of admiralty law disclosed in English reports, in preference to the mere *dicta* of elementary writers. I thought it my duty, however, to notice these authorities, because they seem generally relied on by the Claimant's counsel. In my judgment, the libel is well and properly brought; at least for all the purposes of justice between the parties before the Court; and I overrule the exception taken to its sufficiency.

Having disposed of this objection, I come now to consider the objection made by the United States against the sufficiency of the claim of Mr. Brown; and I am entirely satisfied that his claim must be rejected. It is a well known rule of the prize Court, that the *onus probandi* lies on the Claimant; he must make out a good and sufficient title before he can call upon the captors to shew any ground for the capture. *The Walsingham packet*, 2, *Rob.* 77. If, therefore, the Claimant make no title, or trace it only by illegal transactions, his claim must be rejected, and the Court left to dispose of the cause, as the other parties may establish their rights. In the present case, Mr. Brown claims a title by virtue of a contract and sale made by alien enemies since the war: I say by alien enemies; for it is of no importance what the character of the agent is; the transaction | must have the same legal construction as though made p. 136
by the aliens themselves. Now admitting that this sale was not colorable, but *bona fide*, which, however, I am not, at present, disposed to believe, still it was a contract made with enemies, pending a known war; and therefore invalid. No principle of national or municipal law is better settled, than that all contracts with an enemy, made during war, are utterly void. This principle has grown hoary under the reverend respect of centuries; (19, *Edw.* 4, 6, *cited Theol. Dig. lib.* 1, *ch.* 6, *sec.* 21. *Ex parte Bonsmaker*, 13, *Ves. jun.* 71—*Briston v. Towers*, 6, *T. R.* 45,) and

cannot now be shaken without uprooting the very foundations of national law. *Bynk. Quæst. Pub. Juris, ch.* 3.

I, therefore, altogether reject the claim interposed by Mr. Brown. What, then, is to be done with the property? It is contended, on the part of the United States, that it ought to be condemned to the United States, with a recompense, in the nature of salvage, to be awarded to Mr. Delano. On the part of the Claimant's counsel (who, under the circumstances, must be considered as arguing as *amicus curiæ* to inform the conscience of the Court) it is contended, 1st. That this Court, as a Court of prize, has no proper jurisdiction over the cause. 2d. That if it have jurisdiction, it cannot award condemnation to the United States, for several reasons. 1st. Because, by the law of nations, as now understood, no government can lawfully confiscate the debts, credits, or visible property of alien enemies, which have been contracted or come into the country during peace. 2d. Because, if the law of nations does not, the common law does afford such immunity from confiscation to property situated like the present. 3d. Because, if the right to confiscate exist, it can be exercised only by a positive act of congress, who have not yet legislated to this extent. 4th. Because, if the last position be not fully accurate, yet, at all events, this process, being a high prerogative power, ought not to be exercised, except by express instructions from the president, which are not shown in this case.

Some of these questions are of vast importance and most extensive operation; and I am exceedingly obliged to the gentlemen who have
p. 137 argued them with so | much ability and learning, for the light which they have thrown upon a path so intricate and obscure. I have given these questions as much consideration as the state of my health and the brevity of time would allow; and I shall now give them a distinct and separate discussion, that I may at least disclose the sources of my errors, if any, and enable those who unite higher powers of discernment with more extensive knowledge, to give a more exact and just opinion.

And first....As to the jurisdiction of this Court in matters of prize.

This depends partly on the prize act of 26th June, 1812, ch. 107, § 6, and partly on the true extent and meaning of the admiralty and maritime jurisdiction conferred on the Courts of the United States. The act of 26th June, 1812, ch. 107, provides that in all cases of captured vessels, goods and effects which shall be brought within the jurisdiction of the United States, the district Court shall have exclusive original cognizance thereof, as in civil causes of admiralty and maritime jurisdiction. The act of 18th June, 1812, ch. 102, declaring war, authorizes the president to issue letters of marque and reprisal to private armed ships against the vessels, goods and effects of the British government and its subjects; and to use the whole land and naval force of

the United States to carry the war into effect. In neither of these acts is there any limitation as to the places where captures may be made on the land or on the seas; and, of course, it would seem that the right of the Courts to adjudicate respecting captures would be co-extensive with such captures, wherever made, unless the jurisdiction conferred is manifestly confined by the former act to captures made by private armed vessels. It is not, however, necessary closely to sift this point, as it may now be considered as settled law, that the Courts of the United States, under the judicial act of 30th September, 1789, ch. 20, have, by the delegation of all civil causes of admiralty and maritime jurisdiction, at least as full jurisdiction of all causes of prize as the admiralty in England. *Glass and al. v. the sloop Betsey and al.* 3 *Dall.* 6. *Talbot v. Janson*, 3 *Dall.* 133. *Penhallow and al. v. Doane's administrators.* 3 *Dall.* 54. *Jennings v. Carson*, 4 *Cranch*, 2. Over what captures, | then, p. 138
has the admiralty jurisdiction as a prize Court? This is a question of considerable intricacy, and has not as yet, to my knowledge, been fully settled. It has been doubted whether the admiralty has an inherent jurisdiction of prize, or obtains it by virtue of the commission usually issued on the breaking out of war. That the exercise of the jurisdiction is of very high antiquity and beyond the time of memory, seems to be incontestible. It is found recognized in various articles of the black book of the admiralty, in public treaties and proclamations of a very early date, and in the most venerable relics of ancient jurisprudence. See *Rob. Coll. Marit. Intro. p.* 6, 7. *Id. Instructions*, 3 *H.* 8, *p.* 10, *art.* 18, &c. *Id. p.* 12, *note letter. Edw.* 3, *A. D.* 1343. *Treaty Henry* 7 *and Charles* 8, *A. D.* 1497. *Rob. Coll. Marit. p.* 83 *and p.* 98, *art.* 8. *Rob. Coll. Mar. p.* 189, *note. Roughton, art.* 19, 20, *&c. &c. passim.* In *Lindo v. Rodney, Doug.* 613, *note*, Lord *Mansfield*, in discussing the subject, admits the immemorial antiquity of the prize jurisdiction of the admiralty; but leaves it uncertain whether it was coeval with the instance jurisdiction, and whether it is constituted by special commission, or only called into exercise thereby. After the doubts of so eminent a judge, it would not become me to express a decided opinion. But taking the fact that, in the earliest times, the jurisdiction is found in the possession of the admiralty, independent of any known special commission; that, in other countries, and especially in France, upon whose ancient prize ordinances the administration of prize law seems, in a great measure, to have been modelled, (*Vide Ordin. of France, A. D.* 1400, *Rob. Coll. Marit. p.* 75. *Ordin. of France, A. D.* 1584. *Id. p.* 105. *Treaty Henry* 7 *and Charles* 8. *Id. p.* 83, and *Rob. note, Id.* 105) the jurisdiction has uniformly belonged to the admiralty; there seems very strong reason to presume that it always constituted an ordinary and not an extraordinary branch of the admiralty powers: and so I appre-

hend it was considered by the Supreme Court of the United States, in *Glass and al. v. the Betsey*, 3 *Dall.* 6.

However this question may be, as to the right of the admiralty to take cognizance of mere captures made on the land, exclusively by land forces, as to which I give no opinion, it is very clear that its jurisdiction
p. 139 is not | confined to mere captures at sea. The prize jurisdiction does not depend upon locality, but upon the subject matter. The words of the prize commission contain authority to proceed upon all and all manner of captures, seizures, prizes and reprisals of all ships and goods that are and shall be taken. The admiralty, therefore, not only takes cognizance of all captures made at sea, in creeks, havens and rivers, but also of all captures made on land, where the same have been made by a naval force, or by co-operation with a naval force. This exercise of jurisdiction is settled by the most solemn adjudications. *Key and Hubbard v. Pearse*, cited in *Le Caux v. Eden*, *Doug.* 606. *Lindo v. Rodney*, *Doug.* 613, *note*. *The capture of the Cape of Good Hope*, 2 *Rob.* 274. *The Stella del Norte*, 5 *Rob.* 349. *The island of Trinidad*, 5 *Rob.* 92. *Thorshaven*, 1 *Edw.* 102. *The capture of Chrinsurah*, 1 *Deten.* 179. *The Rebeckah*, 1 *Rob.* 227. *The Gertruyda*, 2 *Rob.* 211. *The Maria Francois*, 6 *Rob.* 282.

Such, then, being the acknowledged extent of the prize jurisdiction of the admiralty, it is, at least in as ample an extent, conferred on the Courts of the United States. For the determination, therefore, of the case before the Court, it is not necessary to claim a more ample jurisdiction; for the capture or seizure, though made in port, was made while the property was waterborne. Had it been landed and remained on land, it would have deserved consideration whether it could have been proceeded against as prize, under the admiralty jurisdiction, or whether, if liable to seizure and condemnation in our Courts, the remedy ought not to have been pursued by a process applicable to municipal confiscations. On these points I give no opinion. See the case of the *Osster Eems* cited in the *Two Friends*, 1 *Rob.* 284, *note*. *Hale de Portubus Maris, &c. in Harg. Law tracts, ch.* 28, *p.* 245, *&c.* *Parker Rep.* 267.

Having disposed of the question as to the jurisdiction of this Court, I come to one of a more general nature; viz. Whether, by the modern law of nations, the sovereign has a right to confiscate the debts due to his enemy, or the goods of his enemy found within his territory at the commencement of the war. I might spare myself the consideration of
p. 140 the question as to *debts;* but, as it | has been ably argued, I will submit some views respecting it, because they will illustrate and confirm the doctrine applicable to goods. It seems conceded, and indeed is quite too clear for argument, that, in former times, the right to confiscate *debts* was admitted as a doctrine of national law. It had the countenance of the civil law. (*Dig. lib.* 41. *tit.* 1.—*id. lib.* 49, *tit.* 15,)—of *Grotius*,

(*De jure belli et pacis, lib.* 3, *ch.* 2, § 2, *ch.* 6. § 2, *ch.* 7, § 3 *and* 4, *ch.* 13, § 1, 2,)—of *Puffendorf*, (*De jure Nat. et Nat. lib.* 8, *ch.* 6, § 23,)—and lastly of *Bynkershoek*; (*Quæst. Pub. Juris, lib.* 1, *ch.* 7,) who is himself of the highest authority, and pronounces his opinion in the most explicit manner. Down to the year 1737, it may be considered as the opinion of jurists that the right was unquestionable. It is, then, incumbent on those who assume a different doctrine, to prove that, since that period, it has by the general consent of nations, become incorporated into the code of public law. I take upon me to say that no jurist of reputation can be found who has denied the right of confiscation of enemies debts. *Vattel* has been supposed to be the most favorable to the new doctrine. He certainly does not deny the right to confiscate; and if he may be thought to hesitate in admitting it, nothing more can be gathered from it than that he considers that, in the present times, a relaxation of the rigor of the law has been in practice among the sovereigns of Europe. *Vattel, lib.* 3, *ch.* 5, § 77. Surely a relaxation of the law in practice cannot be admitted to constitute an abolition in principle, when the principle is asserted, as late as 1737, by Bynkershoek, and the relaxation shewn by Vattel in 1775. In another place, however, Vattel, speaking on the subject of reprisals, admits the right to seize the property of the nation or its subjects by way of reprisal, and, if war ensues, to confiscate the property so seized. The only exception he makes, is of property which has been deposited in the hands of the nation, and intrusted to the public faith; as is the case of property in the public funds. *Vattel, lib.* 2, *ch.* 18, § 342, 343, 344. The very exception evinces pretty strongly the opinion of Vattel as to the general rule. Of the character of Vattel as a jurist, I shall not undertake to express an opinion. That he has great merit is conceded; though a learned civilian, sir James Mac Intosh, informs us that he has fallen into great mistakes in important 'practical discussions of public law.' | *Discourse on the law of nations, p.* 32, *note.* p. 141
But if he is singly to be opposed to the weight of Grotius and Puffendorf, and, above all, Bynkershoek, it will be difficult for him to sustain so unequal a contest. I have been pressed with the opinion of a very distinguished writer of our own country on this subject.—*Camillus, No.* 18 *to* 23, *on the British treaty of* 1794. I admit, in the fullest manner, the great merit of the argument which he has adduced against the confiscation of private debts due to enemy subjects. Looking to the measure not as of strict right, but as of sound policy and national honor, I have no hesitation to say that the argument is unanswerable. He proves incontrovertibly what the highest interest of nations dictates with a view to permanent policy: but I have not been able to perceive the proofs by which he overthrows the ancient principle. In respect to the opinion of Grotius, quoted by him in No. 20, as indicating a doubt

by Grotius of his own principles, I cannot help thinking that the learned writer has himself fallen into a mistake. Grotius, in the place referred to, lib. 3, ch. 20, § 16, is not adverting to the right of confiscation, but merely to the general results of a treaty of peace. He says (§ 15,) that, after a peace, no action lies for damages done in the war; but (§ 16,) that debts due before the war are not, by the mere operations of the war, *released,* but remain suspended during the war, and the right to recover them revives at the peace. It is impossible to doubt the meaning of Grotius, when the preceding and succeeding sections are taken in connexion. Grotius, therefore, is not inconsistent with himself, nor is 'Bynkershoek more inconsistent;' for the latter explicitly avows the same doctrine, but considers it inapplicable to debts confiscated during the war; for these are completely extinguished. *Bynk. Quæst. Pub. Juris, ch. 7.*

It is supposed by the same learned writer, that the principle of confiscating debts had been abandoned for more than a century. That the practice was intermitted, is certainly no very clear proof of an abandonment of the principle. Motives of policy and the general interests of commerce may combine to induce a nation not to inforce its strict rights, but it ought not therefore to be construed to release them. It may, however, be well doubted if the practice is quite so uniform as it is sup-
p. 142 posed. | The case of the Silesia loan, which exercised the highest talents of the English nation, is an instance to the contrary, almost within half a century, (in 1752,) In the very elaborate discussions of national law to which that case gave birth, there is not the slightest intimation that the law of nations prohibited a sovereign from confiscating debts due to his enemies, even where the debts were due from the nation; though there is a very able statement of its injustice in that particular case: and the English memorial admits that when sovereigns or states borrow money from foreigners, it is very commonly expressed in the contract, that it should not be seized as reprisals, or in case of war. Now it strikes me that this very circumstance shews in a strong light the general opinion as to the ordinary right of confiscation. The stipulations of particular treaties of the United States have been cited, in corroboration of their general doctrine, by the claimant's counsel. These treaties certainly shew the opinion of the government as to the impolicy of enforcing the right of confiscation against debts and actions. See *treaty with Great Britain,* 1794, *art.* 10—*with France* 1778, *art.* 20—*with Holland, 8th October* 1782, *art.* 18—*with Prussia, 11th July* 1799, *art.* 23—*with Morocco,* 1787, *art.* 24—But I cannot admit them to be evidence for the purpose for which they have been introduced. It may be argued with quite as much if not greater force, that these stipulations imply an acknowledgement of the general right of confiscation, and provide for a liberal relaxa-

tion between the parties. I hold, with *Bynkershoek*, (*Quæst. Pub. Jur. ch.* 7.) that where such treaties exist, they must be observed; where there are none, the general right prevails. It has been further supposed, that the common law of England is against the right of confiscating debts; and the declaration of *Magna Charta*, ch. 30, has been cited to shew the liberal views of the British constitution. This declaration, so far as is necessary to the present purpose, is as follows: 'If they' (i. e. foreign merchants,) 'be of a land making war against us, and be found in our realm at the beginning of the war, they shall be attached without harm of body or goods (*rerum*) until it be known unto us, or our chief justice, how our merchants be entreated, then in the land making war against us, and if our merchants be well entreated there, theirs shall be likewise with us.' I | quote the translation of *lord Coke*, (2, *Just.* 27.)— p. 143
This would certainly seem to be a very liberal provision; and if its true construction applied to all property and persons, as well transiently in the country as domiciled and fixed there, it would certainly be entitled to all the encomiums which it has received. *Montesq. Spirit of Laws, lib.* 20, *ch.* 14. How far it is now considered as binding, in relation to vessels and goods found within the realm at the commencement of the war, I shall hereafter consider. It will be observed, however, that this article of *Magna Charta*, does not protect the debts or property of foreigners who are *without the realm*: it is confined to foreigners *within* the realm upon the public faith on the breaking out of the war. Now it seems to be the established rule of the common law, that all *choses in action*, belonging to an enemy, are forfeitable to the crown; and that the crown is at liberty, at any time during the war, to institute a process, and thereby appropriate them to itself. This was the doctrine of the year books, and stands confirmed by the solemn decision of the exchequer, in *the Attorney General v. Weeden, Parker Rep.* 267.—*Maynard's Edw.* 2, *cited ibid.*—It is a prerogative of the crown which, I admit, has been very rarely enforced; (See *lord Alvanley's* observations in *Furtado v. Rodgers*, 3, *Bos. and Pul.* 191,) but its existence cannot admit of a legal doubt. On a review of authorities, I am entirely satisfied that, by the rigor of the law of nations and of the common law, the sovereign of a nation may lawfully confiscate the debts of his enemy, during war, or by way of reprisal: and I will add, that I think this opinion fully confirmed by the judgement of the Supreme Court in *Ware v. Hylton*, 3, *Dall.* 199, where the doctrine was explicitly asserted by some of the judges, reluctantly admitted by others, and denied by none.

In respect to the *goods* of an enemy found within the dominions of a belligerent power, the right of confiscation is most amply admitted by Grotius, and Puffendorf, and Bynkershoek, and Burlamaqui, and Rutherforth and Vattel. *See Grotius*, and *Puffendorf*, and *Bynkershoek*

ubi supra; and *Bynk. Qu. Pub. Jur. c.* 4, and 6. 2, *Burlam. p.* 209, *sec.* 12, *p.* 219, *sec.* 2, *p.* 221, *sec.* 11. *Ruth. lib.* 2, *c.* 9, *p.* 558 *to* 573. Such, also, is the rule of the common law. *Hale* in *Harg. law tracts,*
p. 144 *p.* 245, *c.* 18. *Vattel* has indeed contended (and | in this he is followed by *Azuni, Part.* 2, *ch.* 4, *art.* 2, *sec.* 7,) that the sovereign declaring war, can neither detain the persons nor the property of those subjects of the enemy who are within his dominions at the time of the declaration, because they came into the country upon the public faith. This exception (which, in terms, is confined to the property of persons who are within the country,) seems highly reasonable in itself, and is an extension of the rule in *Magna Charta.* But, even limited as it is, it does not seem followed in practice; and Bynkershoek is an authority the other way *Bynk. Quæst. Pub. Jur. c.* 2, 3, 7. In England, the provision in *Magna Charta* seems, in practice, to have been confined to foreign merchants domiciled there; and not extended to others who came to ports of the realm for occasional trade. Indeed, from the language of some authorities, it would seem that the clause was inserted, not so much to benefit foreign merchants, as to provide a remedy for their own subjects, in cases of hostile injuries in foreign countries. (See the opinion of Ch. J. *Lee* in *Key v. Pearse,* cited *Doug.* 606, 607.) However this may be, it is very certain that Great Britain has uniformly seized, as prize, all vessels and cargoes of her enemies found afloat in her ports at the commencement of war. Nay, she has proceeded yet farther, and, in contemplation of hostilities, laid embargoes on foreign vessels and cargoes, that she might, at all events, secure the prey. It cannot be necessary for me to quote authorities on this point. In the articles respecting the *droits of admiralty* in 1665, there is a very formal recognition of the rights of the crown to all vessels and cargoes seized before hostilities. *The Rebeckah,* 1, *Rob.* 227, and *id.* 230, *note* (*a.*) This exercise of hostile right—of the *summum jus,* is so far, indeed, from being obsolete, that it is in constant operation, and, in the present hostilities, has been applied to the property of the citizens of the United States. Of a similar character, is the detention of American seamen found in her service at the commencement of the war, as prisoners of war; a practice which violates the spirit, though not the letter, of *Magna Charta;* and, certainly, can, in equity and good faith, find few advocates. Of the right of Great Britain thus to seize vessels and cargoes found in her ports on the breaking out of war, I do not find any denial in authorities which are |
p. 145 entitled to much weight; and I, therefore, consider the rule of the law of nations to be, that every such exercise of authority is lawful, and rests in the sound discretion of the sovereign of the nation.

The next question is, whether congress (for with them rests the sovereignty of the nation as to the right of making war, and declaring

its limits and effects) have authorized the seizure of enemies' property afloat in our ports. The act of 18th June, 1812, ch. 102, is in very general terms, declaring war against Great Britain, and authorizing the president to employ the public forces to carry it into effect. Independent of such express authority, I think that, as the executive of the nation, he must, as an incident of the office, have a right to employ all the usual and customary means acknowledged in war, to carry it into effect. And there being no limitation in the act, it seems to follow that the executive may authorize the capture of all enemies' property, wherever, by the law of nations, it may be lawfully seized. In cases where no grant is made by congress, all such captures, made under the authority of the executive, must enure to the use of the government. That the executive is not restrained from authorizing captures on land, is clear from the provisions of the act. He may employ and actually has employed the land forces for that purpose; and no one has doubted the legality of the conduct. That captures may be made, within our own ports, by commissioned ships, seems a natural result of the language—of the generality of expression in relation to the authority to grant letters of marque and reprisal to private armed vessels, which the act does not confine to captures on the high seas, and is supported by the known usage of Great Britain in similar cases. It would be strange indeed, if the executive could not authorize or ratify a capture in our own ports, unless by granting a commission to a public or private ship. I am not bold enough to interpose a limitation where congress have not chosen to make one; and I hold, that, by the act declaring war, the executive may authorize all captures which, by the modern law of nations, are permitted and approved. It will be at once perceived, that in this doctrine I do not mean to include the right to confiscate debts due to enemy subjects. This, though a strictly | national right, is so justly p. 146
deemed odious in modern times, and is so generally discountenanced, that nothing but an express act of congress would satisfy my mind that it ought to be included among the fair objects of warfare; more especially as our own government have declared it unjust and impolitic. But if congress should enact such a law, however much I might regret it, I am not aware that foreign nations, with whom we have no treaty to the contrary, could, on the footing of the rigid law of nations, complain, though they might deem it a violation of the modern policy.

On the whole, I am satisfied that congress have authorized a seizure and condemnation of enemy property found in our ports under the circumstances of the present case. And the executive may lawfully authorize proceedings to enforce the confiscation of the same property before the proper tribunals of the United States. The district attorney is, for this purpose, the proper agent of the executive and of the United

States. From the character and duties of his station, he is bound to guard the rights of the United States, and to secure their interests. Whenever he choses to institute proceedings on behalf of the United States, it is presumed by Courts of law that he has the sanction of the proper authorities ; and that presumption will avail, until the executive or the legislature disavow the proceedings, and sanction a restoration of the property.

I have taken up more time than I originally intended, in discussing the various subjects submitted in the argument. An apology will be found in their extraordinary importance. If I shall have successfully shewn that the principles of prize law, as admitted in England and in the United States, have the sanction of the principles of public law and public jurists, I shall not regret the labor that has been employed, although, in this particular case, I may pronounce an erroneous sentence.

I reverse the decree of the district Court, and condemn the 550 tons of timber to the United States ; subject, however, to the right of the owners of the *Emulous* to a reimbursement of their actual charges and expenses for the custody of the property, which I shall reserve for further
p. 147 consideration ; and I shall order the said | property to be sold, and the proceeds brought into Court to abide the further order of the Court.'

Such is the opinion which I had the honor to pronounce in the Circuit Court ; and upon the most mature reflection, I adhere to it. The argument in this Court, urged on behalf of the Claimant, has put in controversy the same points which were urged before me. But as the opinion of this Court admits many of the principles for which I contended, I shall confine my additional remarks to such as have been overruled by my brethren.

It seems to have been taken for granted in the argument of counsel that the opinion held in the Circuit Court proceeded, in some degree, upon a supposition that a declaration of war operates *per se* an *actual confiscation* of enemy's property found within our territory. To me this is a perfectly novel doctrine. It was not argued, on either side, in the Circuit Court, and certainly never received the slightest countenance from the Court. I disclaim, therefore, any intention to support a doctrine which I always supposed to be wholly untenable. I go yet further, and admit that a declaration of war does not, of itself, import a confiscation of enemies' property within or without the country, on the land or on the high seas. The title of the enemy is not by war divested, but remains *in proprio vigore*, until a hostile seizure and possession has impaired his title. All that I contend for is, that a declaration of war gives a right to confiscate enemies' property, and enables the power to whom the execution of the laws and the prosecution of the war are confided, to enforce that right. If, indeed, there be a limit imposed

as to the extent to which hostilities may be carried by the executive, I admit that the executive cannot lawfully transcend that limit; but if no such limit exist, the war may be carried on according to the principles of the modern law of nations, and enforced when, and where, and on what property the executive chooses.

In no act whatsoever, that I recollect, have congress declared the confiscation of enemies' property. They have authorized the president to grant letters of marque and general reprisal, which he may revoke and annul | at his pleasure: and even as to captures actually made under p. 148
such commissions, no absolute title by confiscation vests in the captors, until a sentence of condemnation. If, therefore, British property had come into our ports since the war, and the president had declined to issue letters of marque and reprisal, there is no act of congress which, in terms, declares it confiscated and subjects it to condemnation. If, nevertheless, it be confiscable, the right of confiscation results not from the express provisions of any statute, but from the very state of war, which subjects the hostile property to the disposal of the government. But until the title should be divested by some overt-act of the government and some judicial sentence, the property would unquestionably remain in the British owners, and if a peace should intervene, it would be completely beyond the reach of subsequent condemnation.

There is, then, no distinction recognized by any act of congress, between enemies' property which was within our ports at the commencement of war, and enemies' property found elsewhere. Neither are declared *ipso facto* confiscated; and each, as I contend, are merely confiscable.

I will now consider what, in point of law, is the operation of the acts of Congress made in relation to the present war.

The act of 18th June, 1812, ch. 102, declares war to exist between Great Britain and the United States, and authorizes the president of the United States to use the land and naval force of the United States to carry the same into effect; and further authorizes him to issue letters of marque, &c. to private armed vessels, against the vessels, goods and effects of the government of Great Britain and the subjects thereof.

The prize act of 26th June, 1812, ch. 107, confers the power on the president to issue instructions to private armed vessels, for the regulation of their conduct. The act of 6th July, 1812, ch. 128, authorizes the president to make regulations, &c. for the support and exchange of prisoners of war. The act of 6th July, 1812, ch. 129, respecting trade with the enemy, authorizes the president | to grant passports for the p. 149
property of British subjects within the limits of the United States during the space of six months, and protects certain British packets, &c. with despatches, from capture. The act of 3d March, 1813, ch. 203, vests in

the president the power of retaliation for any violation of the rules and usages of civilized warfare by Great Britain.

These are all the acts which confer powers, or make provisions touching the management of the war. In no one of them is there the slightest limitation upon the executive powers growing out of a state of war; and they exist, therefore, in their full and perfect vigour. By the constitution, the executive is charged with the faithful execution of the laws; and the language of the act declaring war authorizes him to carry it into effect. In what manner, and to what extent, shall he carry it into effect? What are the legitimate objects of the warfare which he is to wage? There is no act of the legislature defining the powers, objects or mode of warfare: by what rule, then, must he be governed? I think the only rational answer is by the law of nations as applied to a state of war. Whatever act is legitimate, whatever act is approved by the law, or hostilities among civilized nations, such he may, in his discretion, adopt and exercise; for with him the sovereignty of the nation rests as to the execution of the laws. If any of such acts are disapproved by the legislature, it is in their power to narrow and limit the extent to which the rights of war shall be exercised; but until such limit is assigned, the executive must have all the right of modern warfare vested in him, to be exercised in his sound discretion, or he can have none. Upon what principle, I would ask, can he have an implied authority to adopt one and not another? The best manner of annoying, injuring and pressing the enemy, must, from the nature of things, vary under different circumstances; and the executive is responsible to the nation for the faithful discharge of his duty, under all the changes of hostilities.

But it is said that a declaration of war does not, of itself, import a right to confiscate enemies' property found within the country at the commencement of war. I cannot admit this position in the extent in
p. 150 which it is | laid down. Nothing, in my judgment, is more clear from authority, than the right to seize hostile property afloat in our ports at the commencement of war. It is the settled practice of nations, and the modern rule of Great Britain herself, applied (as appears from the affidavits in this very cause) to American property in the present war; applied, also, to property not merely on board of ships, but to spars floating alongside of them—I forbear, however, to press this point, because my opinion in the Court below contains a full discussion of it.

It is also said that a declaration of war does not carry with it the right to confiscate property found in our country at the commencement of war, because the constitution itself, in giving congress the power, 'to 'declare war, grant letters of marque and reprisal, and make rules con-'cerning captures on land and water,' has clearly evinced that the power

to declare war did not, *ex vi terminorum*, include a right to capture property every where, and that the power to make rules concerning captures on land and water, may well be considered as a substantive power as to captures of property *within our own territory*. In my judgment, if this argument prove any thing, it proves too much. If the power to make rules respecting captures, &c. be a substantive power, it is equally applicable to all captures, wherever made, on land or on water. The terms of the grant import no limitation as to place; and I am not aware how we can place around them a narrower limit than the terms import. Upon the same construction, the power to grant letters of marque and reprisal is a substantive power; and a declaration of war could not, of itself, authorize any seizure whatsoever of hostile property, unless this power was called into exercise. I cannot, therefore, yield assent to this argument. The power to declare war, in my opinion, includes all the powers incident to war, and necessary to carry it into effect. If the constitution had been silent as to letters of marque and captures, it would not have narrowed the authority of congress. The authority to grant letters of marque and reprisal, and to regulate captures, are ordinary and necessary incidents to the power of declaring war. It would be utterly ineffectual without them. The expression, therefore, of that which is implied in the very nature of the grant, cannot weaken the | force of the grant itself. The words are merely explanatory, p. 151
and introduced *ex abundanti cautela*. It might be as well contended; that the power 'to provide and maintain a navy,' did not include the power to regulate and govern it, because there is in the constitution an express provision to this effect. And yet I suppose that no person would doubt that congress, independent of such express provision, would have the power to regulate and govern the navy; and if they should authorize the executive 'to provide and maintain a navy,' it seems to me as clear that he must have the incidental power to make rules for its government. In truth, it is by no means unfrequent in the constitution to add clauses of a special nature to general powers which embrace them, and to provide affirmatively for certain powers, without meaning thereby to negative the existence of powers of a more general nature. The power to provide 'for the common defence and general welfare,' could hardly be doubted to include the power 'to borrow money;' the power 'to coin money,' to include the power 'to regulate the value thereof;' and the power 'to raise and support armies,' to include the power 'to make rules for the government and regulation' thereof. On the other hand, the affirmative power 'to define and punish piracies and felonies committed on the high seas,' has never been supposed to negative the right to punish other offences on the high seas; and congress have actually legislated to a more enlarged extent. I cannot therefore per-

suade myself that the argument against the doctrine for which I contend, is at all affected by any provision in the constitution.

The opinion of my brethren seems to admit that the effect of hostilities is to confer all the rights which war confers; and it seems tacitly to concede, that, by virtue of the declaration of war, the executive would have a right to seize enemies' property which should actually come within our territory during the war. Certainly no such power is given directly by any statute. And if the argument be correct, that the power to make captures on land or water must be expressly called into exercise by congress, before the executive can, even after war, enforce a capture and condemnation, it will be very difficult to support the concession.
p. 152 Suppose a | British ship of war or merchant ship should now come within our ports, there is no statute declaring such ship actually confiscated. There is no express authority either for the navy or army to make a capture of her; and although the executive might authorize a private armed ship so to do, yet it would depend altogether on the will of the owners of the ship, whether they would so do or not. Can it be possible that the executive has not the power to authorize such seizure? And if he may authorize a seizure by the army or navy, why not by private individuals if they will volunteer for the purpose?

The act declaring war has authorized the executive to employ the land and naval force of the United States, to carry it into effect. When and where shall he carry it into effect? Congress have not declared that any captures shall be made on land; and if this be a substantive power, not included in a declaration of war, how can the executive make captures on land, when congress have not expressed their will to this effect? The power to employ the army and navy might well be exercised in preventing invasion, and in the common defence, without necessarily including a right to capture, if the right to capture be not an incident of war: and upon what ground, then, can the executive plan and execute foreign expeditions or foreign captures? Upon what ground he can authorize a Canadian campaign, or seize a hostile fort or territory, and occupy it by right of capture and conquest I am utterly at a loss to perceive, unless it be that the power to carry the war into effect, gives every incidental power which the law of nations authorizes and approves in a state of war. I am at a loss to perceive how the power exists, to seize and capture enemy's property which was without our territory at the commencement of the war, and not the power to seize that which was within our territory at the same period. Neither are expressly given nor denied (except as to private armed ships,) and how can either be assumed except as an incident of war, acknowledged upon national and public principles? It may be suggested that the executive, 'as commander in chief of the army and navy,' has the

power to make foreign conquests. But this is utterly inadmissible, if the right to authorize captures resides as a substantive power in congress, | and does not follow as an incident of a declaration of war: and p. 153
certainly the rights of the ' commander in chief ' must be restrained to such acts as are allowed by the laws. Besides, the same difficulty meets us here as in the former case; if his powers, as commander in chief, authorize him to make captures without the territory, why not within the territory ?

The acts respecting alien enemies and prisoners of war, have been supposed, even in a state of *actual* war, to confer new powers on the executive. I cannot accede to the inference in the extent to which it is claimed. In general, these acts may be deemed mere regulations of war, limiting and directing the discretion of the executive ; and it cannot be doubted that Congress had a perfect right to prescribe such regulations. To regulate the exercise of the rights of war as to enemies, does not, however, imply that such rights have not an independent existence. Besides, it is clear that the act respecting alien enemies applies only to aliens resident within the country ; and not to the property of aliens, who are not so resident. I might answer, in the same manner, the argument drawn from the act of 6th July 1812, ch. 129, § 4, and the act of 3d of March 1813, ch. 203.—But even admitting that these acts did confer some new powers, still, as these powers do not respect the present case, I cannot consider them as affording even a legislative implication against the existence of the powers for which I contend.

It has been supposed that my opinion assumes for its basis the position, that modern usage constitutes a rule which acts directly on the thing itself by its own force, and not through the sovereign power. Certainly I do not admit this supposition to be correct. My argument proceeds upon the ground, that when the legislative authority, to whom the right to declare war is confided, has declared war in its most unlimited manner, the executive authority, to whom the execution of the war is confided, is bound to carry it into effect. He has a discretion vested in him, as to the manner and extent ; but he cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims. The sovereignty, | as to declaring war and limiting its effects, p. 154
rests with the legislature. The sovereignty, as to its execution, rests with the president. If the legislature do not limit the nature of the war, all the regulations and rights of general war attach upon it. I do not, therefore, contend that modern usage of nations constitutes a rule acting on enemies' property, so as to produce confiscation of itself, and not through the sovereign power : on the contrary, I consider enemies' property in no case whatsoever confiscated by the mere declaration of war ; it is

only liable to be confiscated at the discretion of the sovereign power having the conduct and execution of the war. The modern usage of nations is resorted to merely as a limitation of this discretion, not as conferring the authority to exercise it. The sovereignty to execute it is supposed already to exist in the president, by the very terms of the constitution : and I would again ask, if this general power to confiscate enemies' property does not exist in the executive, to be exercised in his discretion, how is it possible that he can have authority to seize and confiscate any enemies' property coming into the country since the war, or found in the enemies' territory ?—Yet I understood the opinion of my brethren to proceed upon the tacit acknowledgement that the executive may seize and confiscate such property, under the circumstances which I have stated.

On the whole, I am still of opinion that the judgment of the Circuit Court was correct and ought to be affirmed.

It is due, however, to myself to state, that, at the trial in the Circuit Court, it was agreed that the timber had always been afloat on tide waters ; and the affidavit by which it is proved to have rested on land at low tide, was not taken until after the hearing and decision of the cause.

In the opinion which I have expressed I am authorized to state that I have the concurrence of one of my brethren.

The Rapid.—Perry, master.

(8 Cranch, 155) 1814.

After a declaration of war, an American citizen cannot lawfully send a vessel to the enemy's country to bring away his property.

This was an appeal from the sentence of the Circuit Court, for the District of Massachusetts.

The material facts in the case were these.

Jabez Harrison, a native American citizen, the Claimant and Appellant in this case, had purchased a quantity of English goods in England, before the declaration of war by the United States against that country, and deposited them on a small island belonging to the English, called Indian island, and situated near the line between Nova Scotia and the United States. Upon the breaking out of the war, Harrison's agents in Boston hired the Rapid, a vessel licensed and enrolled for the cod fishery, to proceed to the place of deposit and bring away the goods. The Rapid accordingly sailed from Boston on the 3d of July, 1812, with Harrison, the Claimant, on board, proceeded to Eastport, where Harrison was left, and from thence, agreeably to Harrison's orders, to Indian island, where the cargo in question was taken on board. On the 8th of July, while on her return, she was captured by the Jefferson privateer, on the high seas,

and brought into Salem. The goods, being libelled as prize, and claimed by Harrison as his property, were condemned, in the Circuit Court of Massachusetts, to the captors, on the ground that by '*trading with the enemy*,' they had acquired the character of enemies' property.

A claim was also interposed by the United States, on the ground of a violation, by the Rapid, of the non-intercourse act. This claim was also rejected. From the decree of the Circuit Court the United States and Harrison appealed.

HARPER, *for Harrison.*

The ground of condemnation, in the Circuit Court, of the goods in question, was, that *trading with the enemy* made them enemies' property. But we contend that, in this case, there was no *trading with the enemy.* | Trading is a commercial contract or a series of contracts of sale. Contract p. 156
is of the essence of trading. But no commercial transaction of this kind took place between Harrison and *the enemy*. The contract, in the present case, was made, the goods were purchased and paid for *before* the declaration of war ; consequently, when the British were *friends*. Here was merely a case of removal by Harrison of his own property from the enemies' country to this, it was the simple exercise of an act of ownership, an act which surely does not invest the property with a hostile character.

Every citizen has a right, on the breaking out of a war, to withdraw his property, purchased before the war, from the enemy's country and remove it to his own ; and it is certainly the interest of the community to permit such removal.

The cargo, therefore, being American property, neither the declaration of war nor the commission of the privateer authorized the capture.

But this case does not rest on general principles alone. In the case of *Hallet v. Jenks*, 3, *Cranch*, 210, the actual purchase of a cargo in a French port was decided by this Court to be no violation of the non-intercourse act of 13th June, 1798, a case much stronger than the present. Congress, also, has given a very different construction to transactions of this kind by the act of 27th February, 1813, (*laws U. S. vol.* 11, p. 388,) remitting the forfeitures which had accrued under the non-intercourse act of March 1st, 1809. *Laws U. S. vol.* 9, *p.* 243.

The claim of the United States will not, at this time, be interposed.[1]

PITMAN, *contra*, contended,

1. That it appearing, on the face of Harrison's claim, that the property in question was put on board the Rapid in violation of the laws of the United States, he can | have no standing in Court for the purpose of p. 157
claiming the same.

[1] This claim was subsequently, during the same term, revived, and an argument had thereupon. The decision of the Court will be found in the opinion delivered March 15th, in the case of the Sally.

In support of this point he cited the following cases. 2 *Rob.* 72, 77. *The Walsingham Packet.*—5 *Rob.* 28, 32. *The Cornelis and Maria.*—6 *Rob.* 348. *The Recovery.*

2. That all intercourse with the enemy being illegal, the vessel and cargo in question are subjected to confiscation as prize. The following cases were cited as going to establish this point. *Duponceau's Bynkershoek p.* 24. 5 *Rob.* 224, 253, 4. *The Abby.—id.* 302. *The Jonge Cassini.*—1 *Rob.* 208, 248. *The Odin.—id.* 178, 212. *Case of the Fortuna, cited in the case of the Hoop.—Edwards' Adm. Rep.* 32. *The Comet.*—1 *Rob.* 76. *The Santa Cruz.—id.* 196. *The Hoop.—id.* 74, 89. *The Ringende Jacob.*—1 *Bos. and Pul.* 349. *Case of the Louisa Margaretha, cited in Bell v. Gibson.*—8 *T. R.* 556. *Case of St. Philip, cited in Potts v. Bell.—id.* 561. *Lord Kenyon's opinion.*—3 *Rob. Apx. B. p.* 7, 294. *The Angelique.*—4 *Rob.* 289, 355. *The Venus.—id.* 206, 251. *The Nayade.*—1 *Rob.* 126, 150. *The Vrow Judith.—id.* 78, 93. *The Betsey.—id.* 144, 170. *The Neptunus.—id.* 184, 219. *Case of the Nelly cited in note to the case of the Hoop.*—4 *Rob.* 161, 195. *Madonna delle Gracie.*—5 *Rob.* 141. *Juffrow Catharina.*

PINKNEY, *on the same side.*

By the constitution of the United States, congress has power to declare war. War, in the present case, had been declared. After knowledge of the declaration of war, the Claimant fitted out a vessel to go to the enemies' country to bring away his property The voyage was accordingly prosecuted, and the property brought away. By this intercourse with the enemy the vessel and cargo are to be considered as having adhered to the enemy, and as being, *pro hac vice*, hostile.

With regard to the general principle, that trade with an enemy is illegal, there can be no doubt : the principle is recognized by the common law and by the maritime codes of all the European nations. By these laws all intercourse with an enemy, not sanctioned by the sovereign power, is prohibited. This principle is founded on the strongest reasons. Without
p. 158 this salutary | provision, what a wide door would be opened for every species of treasonable intercourse. The English authorities are almost omnipotent on this subject. *Vid.* 8, *T. R.* 554, *Potts v. Bell. Sir J. Nicholl's argument,* and the cases there cited. Many of these authorities are judicial decisions in cases which occurred before the revolution. The principle contended for was therefore brought over, before that time, by the English emigrants to this country, and is consequently to be considered of equal force here as in England.

The doctrine, then, may be considered as established.

The voyage, in this case, was undertaken by Harrison with full knowledge of the war—against his double duty—in violation both of the non-importation act and of the rights of war.

But the Appellants have attempted to take a distinction between a purchase made *before* the declaration of war and a purchase made *since;* and they contend that, as the purchase, in the present case, was made previous to the declaration of war, the property is not liable to confiscation, no *trading* having been carried on with the *enemy*. But all the cases on this subject condemn such a distinction. *Any commercial intercourse with the enemy is trading*, within the meaning of the term as used in prize law; and that, for the very obvious reason before assigned, viz: that if commercial intercourse of any kind were permitted, it would facilitate the means of carrying on a traiterous correspondence.

The case of *Hallet v. Jenks*, 3, *Cranch*, 210, cited by the Appellants, was a case of clear compulsion. The transaction in the present case was perfectly voluntary.

HARPER, *in reply*.

No case has been cited by the Claimant's counsel, in which there was not a trading with the enemy. Here, we contend, there was none. In the case of *Escott*, cited in the case of *the Hoop*, 1, *Rob.* 182, the goods were the product of a trade long carried on, and shipped under fictitious names. *Here* they were shipped openly. No circumstances of suspicion attended the transaction. | In some of the cases cited, part of the goods were p. 159
purchased after the declaration of war. All the cases cited are either new acts of trade, or a continuation of trade in the regular course of employment of the parties, and are also attended with circumstances of suspicion.

The mere act of going into the enemies' country is not illegal. Any man may go thither at any time, if the enemy will permit him. He violates no law of his own country by so doing. Those laws prohibit commercial intercourse only; and that, not because it gives an opportunity of affording information to the enemy and opens a door for the commission of traiterous practices, but because such prohibition is rendered necessary by the modern mode of warfare, which is intended to affect the enemy through his commerce. The principle and object of the rule, therefore, are not applicable to this case. The rule is confined to commercial transactions and commercial objects. If facility of treasonable intercourse were the reason on which the prohibition is founded, it would operate to prevent our citizens from going to the frontiers, or even towards them, an operation which was surely never intended to be given it. The question to be considered in every case of this nature is this: has the privilege of going to the enemies' country been applied to improper purposes?

*Monday, March 7th. Absent....*TODD, *J.*

JOHNSON, *J.* delivered the opinion of the Court as follows:

This capture was made on the high seas, about a month after the declaration of war. The Claimant, Harrison, had purchased a quantity

of English goods in England, 'a long time,' to use his own language, before the declaration of war, and deposited them on a small island, called Indian island, near to the line between Nova Scotia and these states. Upon the breaking out of the war, his agents in Boston hired the Rapid, a licensed vessel in the cod-fishery, to proceed to the place of deposit and bring away these goods. On her return, she was captured by the Jefferson privateer, and was condemned for trading with the enemy's country.

p. 160 On the argument, it was contended, in behalf of the Appellant, that this was not a trading within the meaning of the cases cited to support the condemnation ; that, on the breaking out of a war, every citizen had a right, and it was the interest of the community to permit her citizens, to withdraw property lying in an enemy's country and purchased before the war ; finally, that neither the declaration of war, nor the commission of the privateer authorized the capture of this vessel and cargo, as they were, in fact, American property.

It is understood that the claim of the United States for the forfeiture is not now interposed. The Court, therefore, enters upon this consideration unembarrassed by a claim which would otherwise ride over every question now before us.

This is the first case, since its organization, in which this Court has been called upon to assert the rights of war against the property of a citizen. It is with extreme hesitation, and under a deep sense of the delicacy of the duty which we are called upon to discharge, that we proceed to adjudge the forfeiture of private right, upon principles of public law highly penal in their nature, and unfortunately too little understood.

But a new state of things has occurred—a new character has been assumed by this nation, which involves it in new relations, and confers on it new rights ; which imposes a new class of obligations on our citizens, and subjects them to new penalties.

The nature and consequences of a state of war must direct us to the conclusions which we are to form on this case.

On this point there is really no difference of opinion among jurists : there can be none among those who will distinguish between what it is in itself, and what it ought to be under the influence of a benign morality and the modern practice of civilized nations.

In the state of war, nation is known to nation only by their armed exterior ; each threatening the other with conquest or annihilation. The p. 161 individuals who compose | the belligerent states, exist, as to each other, in a state of utter occlusion. If they meet, it is only in combat.

War strips man of his social nature ; it demands of him the suppression of those sympathies which claim man for a brother ; and accustoms the ear of humanity to hear with indifference, perhaps exultation, 'that thousands have been slain.'

These are not the gloomy reveries of the bookman. From the earliest time of which historians have written or poets imagined, the victor conquered but to slay, and slew but to triumph over the body of the vanquished. Even when philosophy had done all that philosophy could do to soften the nature of man, war continued the gladiatorian combat: the vanquished bled wherever caprice pronounced her fiat. To the benign influence of the Christian religion it remained to shed a few faint rays upon the gloom of war; a feeble light but barely sufficient to disclose its horrors. Hence, many rules have been introduced into modern warfare, at which humanity must rejoice, but which owe their existence altogether to mutual concession, and constitute so many voluntary relinquishments of the rights of war. To understand what it is in itself, and what it is under the influence of modern practice, we have but too many opportunities of comparing the habits of savage, with those of civilized warfare.

On the subject which particularly affects this case, there has been no general relaxation. The universal sense of nations has acknowledged the demoralizing effects that would result from the admission of individual intercourse. The whole nation are embarked in one common bottom, and must be reconciled to submit to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy—because the enemy of his country. It is not necessary to quote the authorities on this subject; they are numerous, explicit, respectable, and have been ably commented upon in the argument.

But, after deciding what is the duty of the citizen, the question occurs, what is the consequence of a breach of that duty? |

The law of prize is part of the law of nations. In it, a hostile character p. 162
is attached to trade, independently of the character of the trader who pursues or directs it. Condemnation to the use of the captor is equally the fate of the property of the belligerent, and of the property found engaged in anti-neutral trade. But a citizen or ally may be engaged in a hostile trade, and thereby involve his property in the fate of those in whose cause he embarks.

This liability of the property of a citizen to condemnation as prize of war, may be likewise accounted for under other considerations. Every thing that issues from a hostile country is, *prima facie*, the property of the enemy; and it is incumbent upon the claimant to support the negative of the proposition. But if the claimant be a citizen or an ally at the same time that he makes out his interest, he confesses the commission of an offence which, under a well known rule of the civil law, deprives him of his right to prosecute his claim.

This doctrine, however, does not rest upon abstract reason. It is

supported by the practice of the most enlightened (perhaps we may say of all) commercial nations. And it affords us full confidence in our decision, that we find, upon recurring to the records of the Court of appeals in prize cases established during the revolutionary war, that, in various cases, it was reasoned upon as the acknowledged law of that Court. Certain it is that it was the law of England before the revolution, and therefore constitutes a part of the admiralty and maritime jurisdiction conferred on this Court in pursuance of the constitution.

After taking this general view of the principal doctrine on this subject, we will consider the points made in behalf of the claimant in this case, and,

1. Whether this was a trading, in the eye of the prize law, such as will subject the property to capture ?

The force of the argument on this point, depends upon the terms made use of. If by *trading*, in prize law, was meant that signification of the term which consists in negotiation or contract, this case would certainly not come under the penalties of the rule. But the object, policy and spirit of the rule is to cut off all communication or actual | p. 163 locomotive intercourse between individuals of the belligerent states. Negotiation or contract has, therefore, no necessary connexion with the offence. *Intercourse* inconsistent with actual *hostility*, is the offence against which the operation of the rule is directed : and by substituting this definition for that of *trading with an enemy*, an answer is given to this argument.

2. Whether, on the breaking out of a war, the citizen has a right to remove to his own country with his property, is a question which we conceive does not arise in this case. This claimant certainly had not a right to leave the United States for the purpose of bringing home his property from an enemy country ; much less could he claim it as a right to bring into this country goods, the importation of which was expressly prohibited. As to the claim for the vessel, it is founded on no pretext whatever ; for the undertaking, besides being in violation of two laws of the United States, was altogether voluntary and inexcusable. With regard to the importations from Great Britain about this time, it is well known that the forfeiture was released on grounds of policy and a supposed obligation induced by the assurances which had been held out by the American charge d'affaires in England. But this claimant could allege no such excuse.

3. On the third point, we are of opinion that the foregoing observations furnish a sufficient answer.

If the right to capture property thus offending, grows out of the state of war, it is enough to support the condemnation in this case, that the act of congress should produce a state of war, and that the com-

mission of the privateer should authorize the capture of any property that shall assume the belligerent character.

Such a character we are of opinion this vessel and cargo took upon herself; or at least, she is deprived of the right to prove herself otherwise.

We are aware that there may exist considerable hardship in this case; the owners, both of vessel and cargo, may have been unconscious that they were violating the duties which a state of war imposed upon them. It does not appear that they meant a daring violation either | of p. 164
the laws or belligerent rights of their country. But it is the unenvied province of this Court to be directed by the head, and not the heart. In deciding upon principles that must define the rights and duties of the citizen and direct the future decisions of justice, no latitude is left for the exercise of feeling.

Friday, March 11th.

The claim of the United States was taken up.

RUSH, *Attorney General.*

The United States claim the property in question, as a forfeiture under the non-intercourse act of 1st March, 1809. This act was in force at the breaking out of the war, and still continued in force at the time of the capture of the Rapid. The 6th section of the act declares the prohibited goods liable to forfeiture immediately on being *shipped* with intention of importing the same into the United States. The United States do not claim in any case but where the vessel was unquestionably bound and sailing to the United States, and when no force was necessary to bring her in. When such a vessel actually arrives in a port of the United States, the intent is not only evidenced, but carried into effect, and the offence is complete.

The arrival, in this case, must be taken as a voluntary coming into port. For as the Rapid was bound to the United States previous to the capture, the intervention of the privateer was immaterial, and cannot be considered as rendering the arrival involuntary. The commencement of the illegal act was at the time of the shipment, and was prior to any forfeiture under belligerent rights. The forfeiture under the non-intercourse act, therefore, relates back to the inception of the offence. The municipal law, we contend, abrogated the *jus belli, pro tanto.*

It is true that, by the 14th section of the prize act of 26th June, 1812, (*laws U. S. vol.* 11, *p.* 238,) provision is made for the importation of British goods captured from the enemy and made good and lawful prize of war; and it is admitted that such goods are forfeited and accrue to the captors; but the question recurs, what

p. 165 is | good and lawful prize of war? Not, we contend, American property in an American bottom coming to the United States, as in the present case.

By the 16th section of the same act, the act of 4th of April, 1812, laying an embargo, and the non-exportation act of the 14th of the same month, are repealed so far as they relate to ships and vessels having commissions or letters of marque and reprisal. It was equally necessary that there should be an express repeal of the non-intercourse act.

By the act of 2d January, 1813, (*laws U. S. vol.* 11, *p.* 341,) directing the secretary of the treasury to remit fines, forfeitures and penalties in certain cases, property shipped and departing from Great Britain between the 23d of June and 15th of September, and forfeited, under the non-intercourse acts, to the United States, is to be restored to the owners: no notice is taken of any claim of the captors. The plain inference is, that the legislature did not suppose that any claim existed on the part of the captors. The same inference may be drawn from the act of 27th February, 1813, (*laws U. S. vol.* 11. *p.* 388.)

The sovereign is not to be deprived of his rights by implication. Where the rights of the sovereign clash with those of a private individual, the rights of the latter must yield to those of the former. 2 *Cranch*, 358. *Fisher v. Blight.—Plowd. fo.* 253. *Hales v. Petit.* This last is a leading case on this point.

From the act of 13th July, 1813, (*laws U. S. vol.* 12, *p.* 14,) it is clearly to be inferred, that, previous to the passage of that act, the rights of the captors were considered as being merged in the forfeiture under the non-intercourse acts. The act of July has merely suspended the right of the United States.

PITMAN, *contra, for the captors.*

We do not claim adversely to the United States, but under the United States, as grantees. We were authorized by our commission to capture this vessel, and, upon capture, it was forfeited to us: condem-
p. 166 nation, we | contend, is not necessary to give us title: our title accrued at the moment of capture. The United States relinquished to us their right by the 4, § of the prize act.

The non-intercourse act had reference solely to time of peace.

The property in question could not be forfeited to the United States, merely by being put on board; for a municipal law can only have a municipal operation; it cannot operate extra-territorially; it can have no effect upon goods in a foreign country, whether that country be hostile or neutral.

Again by the act of 1*st March*, 1809, § 8, no persons are authorized to seize property for a violation of that act, except the officers particularly mentioned therein. Until, therefore, a seizure was made by

some person so authorized, no forfeiture to the United States could attach: and if, as in the present case, a seizure had been made *jure belli*, no seizure under the municipal act could subsequently be made, until the first was determined. 1 *Rob.* 68, 81. *The Mercurius.*

The non-intercourse act was merged in the declaration of war, as it respected British subjects and American citizens: this property was therefore forfeited to the United States *jure belli*: they had a right to seize it *jure belli*: this right they have granted to us, and our title to the property we have captured must be tried *jure belli.* If this were a municipal seizure, and if the property were British, the British owner would have had a right to come into Court and assert his claim; but this he could not now do, being an alien enemy.

The 2 § *of the act of the 13th July*, 1813, we consider, notwithstanding what has been said by the counsel for the United States, as acknowledging a previous right in the captors.

JONES, *on the same side*, considered,

1st. The law independent of the instructions of the president to privateers. |

2d. The instructions themselves. p. 167

1st. The United States did not mean to relinquish the broad ground of *jus belli*, as to British property coming to the United States.

The declaration of war and the prize act, being subsequent to the non-intercourse law, are to be considered as having abrogated or superseded that law.

But if this should not be admitted, we contend that these acts may exist together without any inconsistency. There is room enough for the non-intercourse and the prize act both. It has been decided by this Court, that trading with the enemy is, *per se*, a ground of confiscation. There, then, the prize act may operate. But many hostile cargoes may escape capture, and reach the United States. Many such cargoes may be imported by neutrals. Here is room for the operation of the non-intercourse act.

The act of 13th July, 1813, relinquishing to the captors the claims of the United States to the captured property, is conclusive to show that the United States did not mean to relinquish the rights of war. That act describes the property to which the United States give up their claim, as property captured on the high seas, without limitation.

2d. As to the president's instructions. These instructions do not apply to vessels sailing *after* knowledge of the declaration of war.

But we contend that the president, not having the power of war and peace, had no authority to give such instructions: he could only control the privateers by the power he had of revoking their commis-

sions. There is a difference between his power over these vessels and his power over the public armed ships of the U. States.

The prizes taken by privateers under the prize act, are *forfeitures*, and are to be appropriated differently from those captured under the non-intercourse act.

p. 168 To show that the capture, and not the condemnation, | is the foundation of the captor's right of property, the Court is referred to 1, *Wils.* 211, *Morrough v. Comyns.*

IRVING, *contra.*

By the 3d section of the prize act, privateers are bound to observe all the laws of the United States. Supposing, therefore, the non-intercourse act to have been in force, *they* had no right to seize for a violation of that act. Besides, the mode of prosecution under the non-intercourse act is essentially different from that directed to be pursued under the prize act. There is also a difference in the manner of distributing the captured property.

PINKNEY. The rights of the captors depend not upon the non-intercourse act. Both that and the prize act may be in force at the same time, and operate on the same thing. The first seizure decides which mode of condemnation, &c. shall be adopted.

HARPER, *in reply.*

There is a distinction between importations made by citizens of the United States, and those made by foreigners. The latter cannot be affected by the non-intercourse act, until the goods have arrived within the United States. They commit no offence till the goods are actually imported. But with regard to citizens of the United States, the case is different. *They* are guilty of a violation of the act by the mere *shipment* of prohibited goods in a foreign country, with intent to import the same into the United States. The law, as to them, has an extra-territorial operation; it binds them wherever they are. By the shipment, therefore, at Indian island with intent to import into the United States, the property in the present case, was immediately forfeited; and the right of the United States to the forfeiture, at that moment became complete.

For the opinion of the Court on the foregoing question, respecting the claim of the United States, under the non-intercourse act, see the opinion in the case of the Sally, delivered by STORY, *J. 15th March, 1814, in which the Court decided in favor of the captors.*

The Alexander.—Picket, master.

(8 Cranch, 169) 1814.

A vessel, owned by citizens of the United States, sails from Naples, in the year 1812, for the United States, with a cargo and a British license to carry the same to England. On her passage, hearing that war had broken out between Great Britain and the United States, she alters her course for England; is captured by the British, carried into Ireland, libelled, and acquitted upon her license; sells her cargo, and, after a detention of seven months in Ireland, purchases a return cargo in Liverpool, sails for the United States, and is captured by a United States' privateer. Vessel and cargo condemned as prize to the captors. Capture good, though only a prize master put on board.

THIS was an appeal from the sentence of the Circuit Court for the district of Massachusetts.

The following were the material facts in the case:

The brig Alexander, William S. Picket, master, sailed from Naples, on the 22d June, 1812, with a cargo of brandy, wine and cream of tartar, with a British license to carry the same from Naples to England. She touched at Gibraltar, and there left her deck-load, consisting of brandy, and sailed from thence for the United States. On the 3d of August, 1812, she received intelligence of the war between the United States and Great Britain, and changed her course for England. She was afterwards captured by the British, and sent into Cork, Ireland, and acquitted, and there disposed of her cargo. After seven months detention in Cork, she proceeded to Liverpool, in ballast. At Liverpool, she took in the cargo in question, purchased by Samuel Welles, one of the Claimants, then in England, from the proceeds of the cargo brought from Naples, and sailed from Liverpool for Boston, May 9th, 1813. On the 2d of June following, she was captured by the privateer America, John Kehew, commander, and libelled, as prize, in the district of Massachusetts.

When the Alexander sailed from Naples, she and her cargo were owned, one half by the Claimants, and the other half by W. and S. Robinson, of New York.

The master, on his examination upon the standing interrogatories, stated that the vessel belonged to J. and S. Welles and W. and S. Robinson.

He also stated that, on his arrival in the United States, he delivered to the chief clerk of J. and S. Welles, of Boston, *bills of lading, invoices* and *letters* relating to the *vessel* and *goods*. These papers were never produced by the Claimants.

John Welles, of Boston, claims the vessel and cargo | for himself and p. 170
Samuel Welles, alleging that Samuel Welles, in London, purchased, on their joint account, of the agent of W. and S. Robinson, their half of the brig and the proceeds of the Naples' cargo, before the purchase of the

cargo in question. The United States, also, interposed a claim to the vessel and cargo, as forfeited under the non-importation act.

In the district Court the claim of J. and S. Welles was rejected, and the property condemned to the United States. From this decree the captors and Claimants appealed.

In the Circuit Court the property was condemned to the captors. From this decree the United States and the Claimants appealed.

RUSH, *Attorney General*, stated that it was not the intention of government to interpose.

DEXTER, *for Claimants*.

There being no general rule of the law of nations, that *every* trading with the enemy is unlawful, and there being no municipal law on the subject, an American citizen, surprized abroad by an unexpected war, has a right to use all necessary means to save his property and to secure his return home, provided the means used for that purpose be not inconsistent with the interest of the nation to which he belongs. All the means employed in the present case were necessary to save the property in question: and were so far from being inconsistent with the interest of the United States, that they clearly tended to the national benefit.

That there is no general rule of the law of nations prohibiting all trade with the enemy, is a proposition which probably will not be controverted. Even sir William Scott does not deny the right to withdraw funds, upon the breaking out of a war; he allows that cases of this kind are entitled to be treated with indulgence: he only holds, that if a particular mode of withdrawing funds has been prescribed by the municipal law, as by license, for instance, the person who pursues a different mode
p. 171 is punishable. He has, however, expressly decided, | that where circumstances rendered it impossible for the party to obtain a license, there the property shall not be condemned, if it be a case where a license ought to have been granted, if applied for. 2, *Rob.* 264, 322, *the Harmony*. 3, *Rob.* 37, 38, *the Citto*. 5, *Rob.* 90, *the Ocean*. 4, *Rob.* 193, 234, *the Dree Gebroeders*.

No man is bound, on the breaking out of a war, to abandon his property to the enemy; and if no tribunal is established to decide in what cases property shall or shall not be withdrawn, every man must judge for himself.

In the case of *Hallet v. Jenks*, 3, *Cranch*, 210, there was an entire prohibition of trade; a prohibition more complete than any one which results from any provision of the law of nations; yet this Court decided, in that case, that the party being forced into the prohibited port, and obliged by the public authorities of the place to sell, he might purchase a return cargo. In the present case, the captain of the Alexander, hearing of the war and believing it impossible to reach the United States without

capture, conceived himself to be under the necessity of changing his course for England, or losing his vessel and cargo ; and, having a license, he determined to deceive the enemy. Being captured by a British cruizer and carried into Ireland, he was libelled, but acquitted upon his license. He was compelled to sell his cargo. What was he to do with the proceeds ? Suppose he had sold for bank bills—must he bring them to this country ? He could not bring specie ; it is prohibited. The only way in which he could withdraw his property was to purchase a return cargo and obtain another license. This course he pursued : and we conceive that he was perfectly justified in so doing. The motives for withdrawing his property, after acquittal, were strong, one among others which might be mentioned was the danger that the deception he had practiced upon the enemy would be detected.

2. But allowing, for the sake of argument, that sailing to England after a knowledge of the war, would have been an illegal act—it is clear, in this case, that there was no sailing to England ; there was only an *intention* | to go thither ; and it is a well known rule of law that the bare p. 172 intention to commit an illegal act is not punishable. Again, it cannot be contended that the sailing to Ireland was illegal, as the vessel was forcibly carried in there by the enemy.

3. This is a case, which comes within the additional instruction of the president of the United States to our public and private armed vessels, issued August 28th, 1812. That instruction prohibits the interruption, by our public and private armed vessels, of ' any vessels belonging to citizens of the United States, coming from British ports to the United States laden with British merchandize, in consequence of the alleged repeal of the British orders in council.' Kehew, the commander of the privateer, had received this instruction.

As to the power of the president to issue such instructions, there can be no doubt. Even if there were no act of Congress relating to the subject, the general power of the executive to direct all hostile operations, gives him the particular power in question. But congress has sanctioned the instruction in question by the proviso contained in the 1st sec. of the act of 13th July, 1813. *Laws U. States, vol.* 12, *p.* 16.

But it will be said, perhaps, that this instruction is applicable only to vessels sailing from a British port after the repeal of the orders in council, and *before the knowledge of the war.* Such a construction is erroneous. By the act of congress last mentioned it is provided, That nothing in the said act contained shall extend to any capture made by private armed vessels, in violation of the additional instructions of the president of 28th Aug. 1812, after the captor ' *shall have been* ' apprized thereof. From the use of the phrase, ' shall have been,' it is clear that the instructions were in force as late as the date of the act of 13th July, i.e. nearly a year

after the instructions in question were first given by the president. Government also continued to issue these instructions to the privateers, up to the time of the trial of this cause in the district Court, and afterwards. Now to what vessels coming from a British port and laden with
p. 173 British merchandize, could those instructions apply which were issued more than a year after the declaration of war? Surely not to vessels which sailed while the orders in council were supposed to be repealed, and which had not heard of the war: it would be absurd to suppose that there were any such, so long after the event had taken place. The instructions, therefore, must be considered as having been originally intended to apply to vessels sailing *with* a knowledge of the war, as well as to those sailing without that knowledge. Again, what was the great object government had in view in issuing these instructions? No doubt to give our citizens an opportunity of withdrawing their property from the enemy's country, and bringing it to the United States. Our citizens had immense funds in England. The whole commercial capital of the United States was there. It was an object of vast importance to get it home; and so long as Great Britain would permit us to withdraw it, it was our interest to afford to our citizens every possible facility in aid of that permission. This was the policy of our government, and this the source of the instructions.

3. This was not a capture *jure belli*. The cruizer was afraid of running the risk of damages for an illegal capture. An understanding was, therefore, had between the parties, which was considered as being mutually beneficial, that the captor should preserve his claim to any British goods which might be found on board, and that the residue should remain to the Claimants. A single man only, not a prize crew, was put on board the Alexander. The prize master alone was utterly unable to secure the vessel against a rescue, should one be attempted. He was utterly unable to bring her into port, without the aid of the hands originally belonging to her. How, then, can it be considered as a capture? But if the Court should finally decide it to be a capture, we shall contend that it was only partial, a capture of the British goods only.

PITMAN, *contra*, contended, on behalf of the captors,

1. That Samuel Welles being in England at the time of the purchase of the cargo, he is to be presumed there *animo manendi*, and is clothed with a British character. |
p. 174 2. That the suppression of papers connected with the origin of the voyage, affords a sufficient presumption of a concealment of enemy interests, to subject the vessel and cargo to condemnation.

3. That the vessel and cargo, being taken in trade with the enemy, are condemnable to the captors as enemy's property.

As to the *first point*. It appearing that S. Welles was residing in

England at the time of the purchase of the property in question, it is incumbent on him to explain the circumstances of his residence there. This has not been done. The presumption, then, must be that he was in England *animo manendi* ; that the property was, of course, hostile and liable to condemnation. 1. *Rob.* 87, 103. *The Bernon.*

On the *second point* little need be said. Suppression of papers is always a suspicious circumstance. In the present case it will, no doubt, have its due weight with the Court.

Third point. That here was an actual trading with the enemy, the claimants do not attempt to deny ; but they would justify it on the ground of necessity. They say that the vessel was captured by the enemy and carried into Ireland, where she was compelled to sell her cargo, and had no other means of securing the proceeds, but by laying them out in the purchase of British goods. This plea of necessity comes with a very bad grace from the Claimants. If there were any necessity, it was one voluntarily brought upon themselves. They voluntarily, and, as we contend, unnecessarily, placed themselves and their property in the power of the enemy, after a knowledge of the war ; and can therefore claim no indulgence on the ground of necessity.

The cases which have been cited in which sir William Scott speaks with indulgence of withdrawing funds, are inapplicable to the present case. Where the withdrawing of funds is spoken of, those funds only are meant which were in the enemy's country before the war ; which was not the case here. Besides, the cases cited depend not on *trade* with the enemy, but on *domicil.* | A license to withdraw the property would not p. 175
have been granted in such a case as the present, in England. The president of the United States, acting on English principles, could not have granted a license, supposing him to have the same power in relation to the subject which the king of England has. But he has no such power. Congress has not invested him with it, though they might have done so ; and this Court, it is presumed, will not undertake to say that the present is a case in which a license would have been granted, supposing the president to have possessed the power. No such power, then, having been granted by congress, it is to be presumed that they did not intend there should be any exception to the general rule, that trade with the enemy is unlawful.

But it has been urged that this case comes within the president's instructions of 28th of August, and that this capture, being in violation of those instructions, is void. The vessels contemplated by those instructions are described as vessels coming from British ports, '*in consequence of the alleged repeal of the British orders in council.*' Now it is clear that the Alexander did not sail from the enemy's port in consequence of that alleged repeal ; she cannot, therefore, be within the meaning of the instructions.

The delivery of the instructions to cruizers, after the case contemplated by them no longer existed, is quite unimportant, notwithstanding the great stress which has been laid upon that circumstance by the Claimants. The thing is very easily accounted for. The instructions may have continued to be issued through mere inattention: but the counsel for the Claimants, in the explanation which he has attempted, has given to them a construction in direct hostility both with their letter and spirit....See letter from the secretary of state to Mr. Russel, of August 21, 1812, accompanying the president's message of Dec. 1812.

It has been also contended that there was *no* capture. But here is the property before the Court, and we trust they will not restore it, unless non-capture be fully proved; and even then there can be no restoration
p. 176 unless the Claimants prove their right; which they have not | yet done. They have produced no title papers, no documents whatever, proving property in themselves.

On this point of non-capture, which was insisted on in the Courts below, the District Court ordered further proof. We contend,

1. That as the preparatory examinations prove a capture, no further proof should have been ordered.

2. That the further proof establishes the fact of the capture.

3. That the proof upon this order offered by the Claimants, was inadmissible, being the depositions of the captain and mate, who were examined *in preparatory*.

As to the putting no prize crew on board, that is a circumstance which in no degree alters the nature of the case; it is not essential to capture. The capture is always made before either a prize master or crew are put on board; and if the circumstances of the captured vessel be such as to do away all apprehension of rescue, and inspire confidence that the crew will bring her into port, there is no reason why the property of the captor may not be retained as well by a prize master alone, as by a considerable crew. The object, in such cases, in putting a prize master on board, is merely to keep possession, and shew that the vessel is not abandoned. 6 *Rob.* 21. *The Resolution.* 4 *Rob.* 316, 386. *The William and Mary.*

PINKNEY, *on the same side.*

If the declaration of war is to be considered as confining captures to property belonging to British subjects, municipally speaking, there is an end of the belligerent rights of the United States upon the ocean. But it is not so to be considered; it is to be construed by the law of nations.

The Claimants seemingly deny that there was any capture in this case; but they in fact contend, not for non-capture, but abandonment. We contend that there was a capture, and that it has not been abandoned.
p. 177 It | was unnecessary to put a prize crew on board to navigate the vessel to the United States, for she was already bound thither. If it was the

intention of the captor to abandon her, why put *any* person on board? The very circumstance of putting a prize master on board, clearly evidences an intention *not* to abandon.

It is perfectly immaterial whether the capture was absolute or con ditional only, to secure the British property found on board: To secure *that*, it was necessary to capture the whole: The capture cannot be considered as partial.

It is said, on the part of the Claimants, that there is no general rule of the law of nations that every trading with the enemy is unlawful. We are of a different opinion. *Bynkershoek* lays down the rule. *Bynk. Q. J. P. book* 1, *c.* 3. *Vattel* gives it by implication. He says that, in time of war, not only the two belligerent nations, in their politic capacity, are enemies, but that all the subjects of the one are enemies to all the subjects of the other inclusively. *Vattel, lib.* 3, *c.* 5, § 70. Sir William Scott, in the case of *the Hoop*, 1 *Rob.* 167, has laid down the rule—the *universal rule*. The exception which he allows to this general principle is, that, under certain circumstances, funds may be withdrawn with license from the war-making power. So in the United States licenses for the same purpose may be granted by the same power. But this, as has been already observed, is not a case of withdrawing funds; the funds entitled to the benefit of the exception are such only as were in the country before the war.

It is said by the counsel for the Claimants, that the intention to sail to England was not carried into effect, and therefore no illegal act was committed, even supposing that the act, if committed, would have been illegal. But we contend that the offence was consummated by the overt-act of sailing *for* the enemy's country several days. Such is the law in the case of blockade. Such, also, it is stated to be by sir William Scott, in the case of a vessel sailing to a port which was captured, during the voyage, by the nation to which the vessel belonged. By all the analogies of law an intention *in part executed* completes the offence. 1 *Rob.* 132, 156. *The Columbia.* |

But it has been denied that the act, if carried into execution, would p. 178
have been illegal, in the present case; it has been urged that the safety of the property required it. But the law of nations does not permit a man to secure his property by taking it to the enemy's country.

The case of *Hallet v. Jenks*, was cited as supporting the claim of the Appellants. But there, *compulsion* to sell and to take the produce of the enemy's country in payment, was part of the case stated. Here, the purchase of a return cargo, was *voluntary*; which materially alters the case. Welles ought to have left his funds in the enemy's country.

As to the additional instructions of the president, they clearly do not embrace this case, either by their letter or spirit. An expectation

had been raised that, upon the repeal of the orders in council, our non-intercourse would cease. The instructions were intended to meet this case—to redeem the pledge, and save the national faith. These instructions are explained by the act of congress of January 2, 1813, authorizing the remission of the forfeitures incurred under the non-intercourse act. That act directs the secretary of the treasury to remit the forfeitures in the case of such American property only, as sailed before the 15th September, 1812; a time by which the merchants in England were presumed to have been undeceived.

The proviso to the act of 13th July, 1813, does not alter the nature of the instructions; it leaves them to be expounded by the Courts.

DEXTER, *in reply*.

This is a more favorable case than if the property had been in the enemy's country before the war. The object in going to England, was merely to save the property from British capture, to which it was exposed, and for this purpose to pass through the enemy's country in disguise—conduct perfectly justifiable in a case like this.

As to the capture, no evidence has been produced to prove the fact. If there had been any agreement that this should be considered as a
p. 179 capture, we will admit | that it would have been one. But no such agreement is shown—it does not appear that any thing of the kind was intended.

But supposing it to have been a capture by agreement—even then the extent of the capture must be limited by the terms of that agreement. 1 *Rob.* 204, 243. *The Jonge Jacobus Baumann.*

There is no evidence of Welles being in England *animo manendi*.

*Monday, March 7th. Absent....*TODD, *J.*

MARSHALL, *Ch. J.* delivered the opinion of the Court as follows:

The principles settled in the case of the Rapid decides this cause so far as respects the character of the Alexander and her cargo. In open sea, unpressed by any peculiar danger, with a full knowledge of the war, she changes her course and seeks an enemy's port. If such an act could be justified, it were vain to prohibit trade with the enemy. The subsequent traffic in the enemy country, by which her return cargo was obtained, connects itself with this voluntary sailing for an enemy port; nor does the circumstance that she was carried by force into Ireland, when her actual destination was England, break the chain. The conduct of the Alexander is much less to be defended than that of the Rapid.

But it is alleged by the Claimants, that in this case there was no actual capture. This allegation cannot, in the opinion of the Court, be sustained. That the America took possession of the Alexander with the intention of making prize of that part of her cargo which might be

deemed British, is not controverted. How was this intention to be executed, how was this part of the cargo to be libelled, if it was not captured? And if such part of the cargo as might eventually be British, was captured, and the whole remained together in the vessel, how can the capture be considered as partial?

But it has been truly observed, that it is not non-capture, but abandonment, for which the Complainants in fact contend. |

But while the whole cargo remains together, claimed by the captor, p. 180
if it be enemy property, how can any part of it be said to be abandoned? If it was entirely abandoned, for what purpose was one of the crew of the America put on board the Alexander?

The inability of the prize master to secure the captured vessel against a rescue, should one be attempted, his inability to bring in the vessel without the aid of the hands belonging to her, is, in reason, no proof of abandonment. If the circumstances of the captured vessel be such as to do away all apprehension of rescue, and inspire confidence that the crew will bring her into port, no reason is perceived why the property of the captor, may not be retained as well by a prize master alone, as by a considerable detachment from his crew. The cases cited to this point by the counsel for the captors are entirely satisfactory.

With as little reason do the Claimants seek to shelter themselves under the instructions of the 28th of August, 1812. Those instructions apply, in express terms, to such American vessels as have sailed from Great Britain for the United States, 'in consequence of the alleged repeal of the British orders in council.' A vessel which sailed while those orders were not alleged to be repealed, cannot bring herself within these instructions.

But it is alleged that these instructions are still issued, and must mean something. Rather than ascribe their continuance to inattention, the counsel for the Claimants would give them a construction in direct hostility with their letter and spirit. Were this reasoning even admitted to be correct, which it is not, it would become the duty of the Court to be astute in finding some object to which they might possibly apply. It is possible though certainly it is barely possible, that some vessels which sailed from England while the orders in council were supposed to be repealed, may not yet have reached the United States. It would be more reasonable to reserve these instructions for such possible case, than to apply them to cases which can neither be brought within their words nor their meaning.

The sentence is affirmed with costs.

The Julia.—Luce, master.

(8 Cranch, 181) 1814.

The sailing on a voyage under the license and passport of protection of the enemy, in furtherance of his views or interests, constitutes such an act of illegality as subjects the ship and cargo to confiscation as prize of war.

THIS was an appeal from the Circuit Court for the district of Massachusetts.

D. DAVIS, *for the Claimants.*

The brig *Julia* and cargo, consisting of about three hundred hogsheads of salt, were captured by the United States' frigate Chesapeake, Samuel Evans, commander, about the last of December, 1812, and libelled and condemned in the district Court of Massachusetts. Upon appeal to the Circuit Court, the sentence of condemnation was affirmed, and the Claimants now appeal to this Court.

The allegation, in the libel, is, that the property belongs to British subjects.

The facts proved and relied upon by the Claimants, and which are fully substantiated by the documents contained in the record, are as follows: That the Julia and cargo were owned wholly by the Claimants, who are native American citizens; that she was documented as an American ship, for a voyage from Baltimore to Lisbon, with a cargo of corn, flour, and bread; that she sailed with this cargo from Baltimore to Lisbon, where she arrived in safety; that the outward cargo was there sold to Portuguese merchants, in that port, and a return cargo of salt purchased with a part of the proceeds of the outward cargo; and that, as the Julia was returning to Boston, her port of discharge, with her homeward cargo, she was captured by the Chesapeake; that all the transactions of the voyage were really and truly for account of the Claimants, and that, *in point of fact,* no connexion, intercourse, trade, supply, or other matter or thing relative thereto, was ever had, made, intended, or contemplated with the enemy, in the whole course of this voyage.

It is admitted by the Claimants, that copies of the following documents signed and granted by admiral Sawyer and Andrew Allen, late the British consul at Boston, were filed in the Courts below, and, for the
p. 182 reasons stated by the learned judges, admitted in evidence, viz:

1*st. A license from admiral Sawyer, in the words following:*

'By Herbert Sawyer, esq. vice admiral of the blue, and com-
[SEAL.] mander in chief of his majesty's ships and vessels employed and to be employed in the river Saint Lawrence, along the coast of Nova Scotia, the islands of Anticosti, Madelaine and Saint John,

and Cape Breton and the bay of Fundy, and at and about the island of Bermuda, or Somers' Islands, &c. &c. &c.

'Whereas Mr. Andrew Allen, his majesty's consul at Boston, has recommended to me Mr. Robert Elwell, a merchant of that place, and well inclined towards the British interest, who is desirous of sending provisions to Spain and Portugal, for the use of the allied armies in the Peninsula, and whereas I think it fit and necessary that encouragement and protection should be afforded him in so doing.

'These are therefore to require and direct all captains and commanders of his majesty's ships and vessels of war which may fall in with any American, or other vessel bearing a neutral flag, laden with flour, bread, corn or peas, or any other species of dry provisions, bound from America to Spain or Portugal, and *having this protection on board*, to suffer her to proceed without unnecessary obstruction or detention in her voyage; provided she shall appear to be steering a due course for those countries, and it being understood this is only to be in force for one voyage and within six months from the date hereof.

'Given under my hand and seal, on board his majesty's ship Centurion, at Halifax, this fourth day of August, one thousand eight hundred and twelve.

'H. SAWYER, *Vice Admiral.*'

By command of the vice admiral.
WILLIAM AYRE. |

2d. The following document signed by Andrew Allen. p. 183

'To the commanders of his majesty's ships of war or of private armed ships belonging to subjects of his majesty.

'Whereas from the consideration of the great importance of continuing a regular supply of flour and other dried provisions to the allied armies in Spain and Portugal, it has been deemed expedient by his majesty's government that, notwithstanding the hostilities now existing between Great Britain and the United States, every degree of encouragement and protection should be given to American vessels laden with flour and other dry provisions, and *bona fide* bound to Spain or Portugal. And whereas, in furtherance of these views of his majesty's government, Herbert Sawyer, esq. vice admiral and commander in chief on the Halifax station, has addressed to me a letter under the date of the 5th of Aug. 1812, (a copy whereof is hereunto annexed) wherein I am instructed to furnish a copy of his letter, certified under my consular seal, to every American vessel so laden and bound, destined to serve as a perfect safeguard and protection of such vessel in the prosecution of her voyage. Now, therefore, in obedience to these instructions, I have granted to

the American brig Julia, Tristram Luce, master, of 159 tons burthen now lying in the harbor of Boston, and bound to Baltimore for the purpose of taking in a cargo of flour and corn, and proceeding thence to a port in Spain or Portugal, not under French domination, the annexed documents, requesting all officers commanding his majesty's ships of war, or private armed ships belonging to subjects of his majesty, to give to the said vessel all due assistance and protection in the prosecution of her voyage to Spain or Portugal, and on her return thence to her port of original departure, laden with salt or with specie to the nett amount of her outward cargo, or in ballast only.

[CONSULAR SEAL.] 'Given under my hand and seal of office at Boston, this eighteenth day of September, 1812.

'ANDREW ALLEN, jun.
His majesty's consul.'

p. 184 3d. 'A copy of admiral Sawyer's letters to A. Allen, referred to in the preceeding document, and certified under the consular seal; as follows:

(COPY.)

'*His Majesty's ship Centurion,*
At Halifax, the 5th of August, 1812.

'SIR,

'I have fully considered that part of your letter of the eighteenth ultimo, which relates to the means of insuring a constant supply of flour and other dried provisions, to the allied armies in Spain and Portugal, and to the West India islands; and, being aware of the importance of the subject, concur in the proposition you have made. I shall therefore give directions to the commanders of his majesty's squadron under my command, not to molest American vessels unarmed and so laden, "*bona fide*" bound to British, Portuguese or Spanish ports, whose papers shall be accompanied with a certified copy of this letter under the consular seal.

'I have the honor to be, sir,
'Your most obedient humble servant,
'H. SAWYER, *Vice Admiral.*

To Andrew Allen, esq.
his majesty's consul, Boston.

'*Office of his Britannic Majesty's Consul.*

'I, Andrew Allen, jun. his Britannic majesty's consul for the states of Massachusetts, New Hampshire, Rhode Island and Connecticut, hereby certify that the annexed paper is a true copy of a letter addressed

to me by Herbert Sawyer, esq. vice admiral and commander on the Halifax station.

[CONSULAR SEAL.] 'Given under my hand and seal of office, at Boston, in the state of Massachusetts, this eighteenth day of September, in the year of our Lord, one thousand eight hundred and twelve.

'ANDREW ALLEN, jun.' |

If the opinions of the Courts below, in admitting copies of these documents to be received as evidence, were correct, then it is also admitted that these licenses and letters had been obtained for, and were found on board the Julia, at the time of her capture. p. 185

Upon this statement, and upon the evidence contained in the record, the Claimants submit two points to the decision of the Court.

1. That the mere acceptance or possession of the British license and documents, do not subject the property to condemnation.

2. That if the peculiar terms of the license in this case create a presumption unfavorable to the Claimants, either of an intention to supply the enemy, or of any other unlawful intercourse with the enemy, such presumption is entirely destroyed by the evidence in the case, which shews that no such supply or intercourse did ever, *in fact*, take place.

As to the first point. The nature and effect of an enemy's license, so far as respected the acceptance, possession or use of such a document by an American citizen, were so fully and ably pointed out in the case of the *Aurora*, that the counsel for the Claimants, is content to rely upon, and to refer the Court to the arguments and authorities which were submitted and quoted in that case, upon this point.

But *as to the second point.* If the Julia had been captured on her passage to Lisbon, with these British documents on board, there might have been some ground for a condemnation :—The suspicious or obnoxious parts of them, such as those which state that 'Elwell is well inclined towards the British interest,' and that he contemplates furnishing supplies to the allied armies in the Peninsula, might have raised a presumption that such was his intention, and would have cast the *onus probandi* upon him, or upon those in whose hands the license might be found. But it is contended, that if, upon furnishing the proof, it shall appear that no unlawful intercourse with the enemy ever did, *in fact, take place*, and, moreover, that no such intercourse was ever even *intended* | to be held with the enemy, the presumption against the Claimants, arising from the terms of the British documents, will be entirely destroyed, and the Complainants left in a state wholly free from guilt, both legal and moral. p. 186

That this is a correct position, the Court is referred to the case of the *Matilda*, decided in the North Carolina Circuit, by the chief justice of the

United States, and reported in the *American law journal, p.* 478. In that case, the license was granted after the war, and for the express purpose of a trade and supply to the *British W. I. islands*: But there was no evidence that any *act* of trading had been *committed.* In that case the *chief justice* is said to have declared, 'that there was no evidence of 'a criminal intent, except that of the license; that the obtaining the 'license was to deceive the enemy, which the Claimants lawfully might do; 'and that the case was cleared of all doubts by the evidence, which stated 'the *real object of the voyage.*'

In the case of the *Abby,* 5 *Rob. p.* 254, it is expressly stated to be law 'that there must be an *act of trading* to the enemy country, as well as the '*intention*; that there must be a *legal* as well as *moral* illegality.' It is in the same case stated, that 'no case has been produced, in which a *mere* '*intention* to trade with the enemy, *contradicted by the fact,* enures to 'condemnation.' Upon both points (said sir William Scott,) 'I am of 'opinion, that the Claimant is entitled to restitution. On the 1st, there 'was no *illegal act*; on the 2d, there was neither *intention* nor *act.*'

There is no principle better known or established by the writers both upon law and ethics, than that there must be both a *will* and an *act* to constitute an offence. The *act* is necessary to demonstrate the depravity of the *will*: a vicious *will,* without a vicious *act* is no offence.

It is not denied, that the Julia and her outward cargo were the property of the Claimants: it is not denied, that the Julia, on her departure from Baltimore, was documented, in every respect, as required by law, as an American ship bound from Baltimore to Lisbon, with a cargo of flour, corn and bread. |

p. 187 It is not denied, that the Julia, with this cargo on board, was ordered to proceed, and that she did in fact proceed, to Lisbon; and that it was the *intention* of the owners that the cargo should be there sold, to the best advantage, to merchants or other subjects of that government; nor is it denied, that the Julia and cargo did, *in fact,* proceed to Lisbon for these purposes.

It is not denied, that this cargo of corn, flour and bread, was in fact carried to Lisbon, there landed, and *sold to a house of merchants of that city.* It is also a fact, probably not disputed, that the cargo of salt, with which the Julia was laden, and with which she was captured on her homeward voyage, was purchased with the proceeds of the cargo sold at Lisbon. And it is not *pretended* that there was *any intercourse* with the enemy at Lisbon, or with any of his agents; or that there was in reality, any *sale, contract or other transaction by the Claimants, or their agents, that any part of the cargo, or of the proceeds of it, should, in any manner, serve as a supply or come to the hands and possession of the enemy.* On the other hand, it does appear from all the evidence in the case, that the whole object

of the voyage was to export the cargo of the Julia to Lisbon, there to be sold, and the proceeds to be invested in such funds as are pointed out in the owners' letter of instructions to the captain. The intention to trade with, or supply, the enemy, is proved only from the *prima facie* evidence of the license and other British documents; and this evidence is fully explained and counteracted by the whole mass of evidence in the case, shewing the *real object* of the voyage, and that no supply, trading or intercourse were in fact had with the enemy.

If the bare possession or acceptance of a license condemns the property which it purports to protect, the Julia must be condemned; but if the *presumptive* or *prima facie* evidence resulting from the possession of the license, *however obnoxious may be the terms of it*, can be explained and counteracted by evidence of the facts, the Julia and cargo must be restored. The former position, it is conceived, will never be sanctioned by this Court; and if the latter be not established, the Claimants will be severely punished for an act which they *never committed*, and which they *never intended* to commit, viz. that of trading with, and supplying the enemies of their country. | The case of the Julia, therefore, turns *upon* p. 188
a question of fact. Did the Julia pursue a voyage to a neutral port, and was her cargo disposed of to the subjects of a neutral country, or did she pursue the voyage and furnish the supplies *to the enemy*, which appear to have been the objects of the British admiral? It is repugnant to law and reason, that a man shall not be permitted to prove his innocence; and, when he has proved it, that he should be held guilty, and punished. If taken with the mainour, may he not prove that he came honestly by the goods?

If a contrary doctrine be established, it will lead to one inevitable result; viz. *a prohibition of all trade from this to a neutral country which happens to be in alliance with Great Britain:* it will be, in fact, declaring that a cargo of flour shall not be exported to Spain or Portugal, because the neutral subjects, to whom it may be there sold, may sell it again to their British allies.

This case is distinguishable from, and stands upon much firmer ground than that of the *Aurora.* In that case, the ship was taken on her outward passage, and (as it was alleged) out of her course to her ostensible port. It was therefore impossible for the Claimants to remove the presumption against them, arising from the possession of the license, by the *subsequent events of the voyage.* But in this case, every thing is explained, and every doubt or suspicion removed by the evidence shewing the *bona fide* objects and ultimate termination of the voyage. The case is thus cleansed of *every thing* that might be presumed to be foul by the *unhappy* terms of the license, or the *officious* and unofficial interpositions of Mr. Allen. The case must turn upon the *bona fide* views, and intention

of the Claimants, and upon the evidence that, *in point of fact,* no unlawful intercourse between them and the enemy *ever existed,* or was ever *contemplated.* If they have merely accepted a license, but have made no *unlawful use* of it, *they cannot be injured by it.*

RUSH, *Attorney General, in behalf of the United States.*

It is utterly impossible that, if any American property, embarked in a trade under an enemy license, can be the subject of prize, this should escape. The transaction is the most obnoxious of its class ; and presents
p. 189 the | leading question in its most advantageous forms for the captors.

The object of the enemy was supply to the allied armies in Portugal and Spain. The engagement to execute that purpose was the consideration of the protection granted by the license. The purpose was executed in fact, and in strict conformity with the engagement. The homeward cargo was purchased with the proceeds of the outward ; and, when captured, was still under the protection of the license. If the circumstances in this case do not amount to a trading with the enemy, there is no such thing. If this license, (or rather these licenses,) should not be held to give to the property a hostile character, no license, whatever may be the facts with which it is combined, can produce that effect.

There can be no foundation for restitution in this case but one. It has been doubted whether *American* property can, for any cause, become subject to confiscation as prize, when captured by a privateer ; and it will be contended (as it is understood) in the case of the Frances, that it cannot.

The capture on this occasion, however, was made by a *national vessel,* in virtue of the *declaration of war,* and the public law of the world operating upon it. The attorney general does not believe that this difference in fact creates any difference in the legal conclusion ; because he supposes that privateers have, upon the sound construction of the act of congress, the same rights of capture with national vessels ; but he contends that, even if it should be held that the rights of capture, vested by their commissions in *private armed* vessels, are confined to property strictly (not *constructively*) British, the rights of *national* vessels are not so restricted.

The Court is referred to the opinion at large (in the transcript,) of the learned judge by whom this cause was decided in the Circuit Court, for a very able discussion of the doctrine which it involves.

Monday, March 7th, 1814. *Absent*...TODD, *J.*

STORY, *J.* delivered the opinion of the Court as follows : |
p. 190 The facts of this case, and the grounds upon which a decree of condemnation was pronounced in the Circuit Court, fully appear in the opinion of that Court which accompanies this record. That opinion has been submitted to my brethren, and a majority of them concur in the

decree of condemnation, upon the reasons and principles therein stated. It is not thought necessary to repeat those reasons and principles in a more formal manner; it is sufficient to declare as the result of them, that we hold, that the sailing on a voyage under the license and passport of protection of the enemy, in furtherance of his views or interests, constitutes such an act of illegality, as subjects the ship and cargo to confiscation as prize of war; and that the facts of the present case afford irrefragable evidence of such act of illegality.

The judgment of the Circuit Court is therefore affirmed with costs.

The following is the opinion of the Circuit Court of Massachusetts referred to, in the foregoing opinion.

'The *Julia* and cargo were captured, as prize, by the United States' frigate Chesapeake, commanded by captain Evans, on the 31st December, 1812. From the preparatory evidence and documents it appears that she sailed from Baltimore, on or about the 31st October, 1812, bound on a voyage to Lisbon, with a cargo of corn, bread and flour; and the capture took place on the return voyage to the United States. The vessel and cargo were documented as American, and as owned by the Claimants, who are American citizens. The vessel had on board sundry documents of protection from British agents, which were delivered up to the captors, and, together with the other ship's papers, were put on board of the prize, in the custody of the prize master; and these documents were the unquestionable cause of the capture. It appears that the American master and crew were left on board the prize, and, during the subsequent voyage to the United States, these British documents were taken from the custody of the prize master surreptitiously and without his knowledge as to the time or manner: he alleged expressly that they were stolen, and this allegation seems | admitted by the master, in a supplementary p. 191
affidavit, who, however, denies any knowledge or connexion in the transaction. The prize master took exact copies of these documents, for the purpose of sending them to the secretary of the navy; which copies have been produced in Court, and verified by his affidavit. All the other original documents have been faithfully produced. Upon the examination of the master upon the standing interrogatories, on the 18th February, 1812, although there are several interrogatories, and particularly the 16th and 27th, which point directly to the subject matter, he did not state the existence of any British document, passport, safeguard or protection; and, what is quite as remarkable, he expressly declared that he knew not upon what pretence nor for what reason the vessel and cargo were captured. It was not until after the time assigned for the trial, and on the 8th of March, 1813, that the master, by a supplementary affidavit, (which was admitted through great indulgence, and contrary to the general practice of prize Courts,) attempted to explain his omission, and

to vindicate his misconduct. The apology is equally weak and futile. At the time when these examinations were taken, the interrogatories had been drawn up with care and deliberation. The commissioners were present to explain to the understanding of every man intent on truth, the meaning of any question which might appear obscure. The master was a part owner of the vessel and cargo, and the regular depository of all the papers connected with the voyage. It is utterly incredible that he should not recollect, on his examination, the existence of these British documents. They were put on board for the special safeguard and security of the vessel and cargo. Indeed, independent of them, the risque of the capture would have been imminent. A master can never be admitted to be heard, in a prize Court, to aver his ignorance or forgetfulness of the documents of his ship. It is his duty to know what they are; and he cannot be believed ignorant of their contents, without overthrowing all the presumptions which govern in prize proceedings. Looking to the whole conduct of the master, it seems to be irreconcilable with the rules of morality and fair dealing; and I have great difficulty in exempting him from the imputation of being guilty of a wilful suppression of the truth. |

p. 192 At the hearing, a preliminary objection was taken to the introduction of the copies of the British documents, upon the ground that the originals, as the best evidence, ought to be produced. The rule undoubtedly applies when the originals are in existence, and in the possession or control of the party. The extraordinary disappearance of these important papers, under the circumstances of this case, I can have little doubt was occasioned by a fraudulent substraction. There is no reason to impute this substraction to the prize master. The documents were to him a very important protection; they constituted the avowed reason of the capture, as the mate and some of the seamen testify. It is true that the master has declared that he knew not the pretence of capture; but it can hardly be believed that he could be ignorant of a fact which so materially affected his interest. I feel myself bound to make very unfavorable inferences against him; and if, *in odium spoliatoris*, I impute the substraction to some person on board connected with the voyage, and in the confidence of the master, it is measuring out no injustice to one who appears to deem mis-statements and concealments no violent breach of good faith. I shall, therefore, admit the copies, verified as they are, as good evidence in these proceedings; and I will add, that if a single material fact in favor of the Claimants had depended upon the supplementary affidavit of the master, I should have felt myself compelled to repudiate it in order to vindicate the regularity of prize proceedings, and suppress the efforts of fraud to derive benefit from after thoughts and contrivances. These remarks are not made without regret; but public duty requires that

manifest aberrations from moral propriety should not receive shelter in this Court.

Having disposed of this preliminary objection, I now proceed to consider the two questions which have been so ably discussed in this case.

1st. Whether the use of an enemy's license or protection, on a voyage to a neutral country in alliance with the enemy, be illegal so as to affect the property with confiscation.

2d. If not, whether the terms of the present license distinguish this case unfavorably from the general principle. |

The British documents which were on board, and which, for conciseness, I have termed a license, are as follows : p 193

[☞ *It is thought unnecessary to insert these documents here, as they are to be found at length in the argument of the Claimant's counsel in the former part of this report.*]

In approaching the more general question which has been raised in this case, I am free to acknowledge that I feel no inconsiderable diffidence, both from the importance of the question, and the different opinions which eminent jurists have entertained respecting it : Nor am I insensible, also, that it has entered somewhat into political discussions, and awakened the applause and zeal of some, and the denunciations of others, considered merely as a subject of national policy, and not of legal investigation. It has now become my duty to examine it ; and, whatever may be my opinion, I feel a consolation that it is in the power of a higher tribunal to revise my errors, and award ample justice to the parties.

At the threshold of this enquiry, I lay it down as a fundamental proposition, that strictly speaking, in war all intercourse between the subjects and citizens of the belligerent countries is illegal, unless sanctioned by the authority of the government, or in the exercise of the rights of humanity. I am aware that the proposition is usually laid down in more restricted terms by elementary writers, and is confined to commercial intercourse. *Bynkershoek* says, '*Ex natura belli, commercia inter hostes cessare, non est dubitandum. Quamvis nulla specialis sit commerciorum prohibitio, ipso tamen jure belli commercia esse vetita, ipsæ indictiones bellorum satis declarant.*' *Bynk. Q. J. P. book* 1, *c.* 3. And yet it seems not difficult to perceive that his reasoning extends to every species of intercourse. *Valin*, in his commentary on the French ordinance, speaking of the reason of requiring the name and domicil in a policy, says, '*Est encore de connaître, en temps de guerre, si malgré l'interdiction de commerce, qu'emporte toujours toute déclaration de guerre, les sujets du Roi ne font point commerce avec les ennemis de l'Etat, ou avec des amis ou alliés, par l'interposition desquels on ferait passer aux* | *ennemis des munitions de guerre et de bouche, ou d'autres effets prohibés ;* p. 194 *car tout cela, étant défendu comme préjudiciable à l'état, serait sujet à con-*

fiscation, et à être declaré de bonne prise.' Lib. 1, *tit.* 6, *art.* 3, *p.* 31. In another place, adverting to a case of neutral, allied, and French property on board an enemy ship, &c. he declares it subject to confiscation, because '*C'est favoriser le commerce de l'ennemi et faciliter le transport de ses denrées et marchandises, ce qui ne peut convenir aux traites d'alliance ou de neutralité, encore moins aux sujets du Roi auxquels toute communication avec l'ennemi est étroitement défendu sous peine même de la vie.' Lib.* 3, *tit.* 9, *art.* 7, *p.* 253. And *Valin, Traité des Prises, chap.* 5, *sec.* 5, *p.* 62.

From this last expression it seems clear that *Valin* did not understand the interdiction as limited to mere commercial intercourse. In the elaborate judgment of *sir W. Scott,* in *the Hoop,* 1, *Rob.* 165, 196, the illegality of commercial intercourse is fully established as a doctrine of national law : but it does not appear that the case before him required a more extended examination of the subject. The black book of the admiralty contains an article which deems every intercourse with the public enemy an indictable offence. This article, which is supposed to be as old as the reign of Edw. III, directs the grand inquest '*Soit enquis de tous ceux qui entrecommunent, vendent ou achètent avec aucuns des ennemis de notre Seigneur le Roi sans license spécial du Roi ou de son amiral.*' But, independent of all authority, it would seem a necessary result of a state of war to suspend all negotiations and intercourse between the subjects of the belligerent nations. By the war every subject is placed in hostility to the adverse party. He is bound by every effort of his own to assist his own government, and to counteract the measures of its enemy. Every aid, therefore, by personal communication, or by other intercourse, which shall take off the pressure of the war, or foster the resources, or increase the comforts of the public enemy, is strictly inhibited. No contract is considered as valid between enemies, at least so far as to give them a remedy in the Courts of either government ; and they have, in the language of the civil law, no ability to sustain a *persona standi in judicio.* The ground upon which a trading with the
p. 195 enemy | is prohibited, is not the criminal intentions of the parties engaged in it, or the direct and immediate injury to the state. The principle is extracted from a more enlarged policy, which looks to the general interests of the nations, which may be sacrificed under the temptation of unlimited intercourse, or sold by the cupidity of corrupted avarice. In the language of *sir William Scott,* I would ask, ' Who can be insensible to the consequences that might follow, if every person, in time of war, had a right to carry on a commercial intercourse with the enemy, and, under color of that, had the means of carrying on any other species of intercourse he might think fit ? The inconvenience to the public might be extreme ; and where is the inconvenience on the other side, that the merchant should be compelled, in such a situation of the two countries,

to carry on his trade between them (if necessary) under the eye and control of the government charged with the care of the public safety ? '

Nor is there any difference between a direct intercourse between the enemy countries, and an intercourse through the medium of a neutral port. The latter is as strictly prohibited as the former. 4 *Rob.* 65, 79. *The Jonge Pieter.*

It is argued that the cases of trading with the enemy are not applicable, because there is no evidence of actual commerce ; and an irresistible presumption arises from the nature of the voyage to a neutral port, that no such trade is intended. If I am right in the position, that all intercourse, which humanity or necessity does not require, is prohibited, it will not be very material to decide whether there be a technical commerce or not. But is it clear, beyond all doubt, that no inference can arise of an actual commerce ? The license is issued by the agents of the British government, and, I must presume, under its authority. It is sold (as it is stated) in the market ; and if it be a valuable acquisition, the price must be proportionate. If such licenses be an article of sale, I beg to know in what respect they can be distinguished from the sale of merchandize ? If purchased directly of the British government, would it not be a traffic with an enemy ? If purchased indirectly, can it change the nature of the transaction ? It has been said | that if pur- p. 196
chased of a neutral, the trade in licenses is no more illegal than the purchase of goods of the enemy fabric *bona fide*, conveyed to neutrals. Perhaps this may, under circumstances, be correct : but I do not understand that the purchase of goods of enemy manufacture, and avowedly belonging to an enemy, is legalized by the mere fact of the sale being made in a neutral port. The goods must have become incorporated into the general stock of neutral trade, before a belligerent can lawfully become a purchaser. If such licenses be a legitimate article of sale, will they not enable the British government to raise a revenue from our citizens, and thereby add to their resources of war ? Admit, however, that they are not so sold, but are a measure of policy adopted by Great Britain to further her own interests, and ensure a constant supply of the necessaries of life, either in or through neutral countries ; can it be asserted that an American citizen is wholly blameless, who enters into stipulations and engagements to effect their purposes ? Is not the enemy thereby relieved from the pressure of the war, and enabled to wage it more successfully against the other branches of the same commerce not protected by this indulgence ?

It is said that the case of a personal license is not distinguishable from a general order of council authorizing and protecting all trade to a neutral country. In my judgment they are very distinguishable. The first pre-supposes a personal communication with the enemy, and an

avowed intention of furthering his objects, to the exclusion of the general trade by other merchants to the same country; it has a direct tendency to prevent such general trade; and relieves the enemy from the necessity of resorting to a general order of protection; it contaminates the commercial enterprizes of the favored individual with purposes not reconcilable with the general policy of his country; exposes him to extraordinary temptations to succour the enemy by intelligence; and separates him from the general character of his country, by clothing him with all the effective interests of a neutral. Now these are some of the leading principles upon which a trade with the enemy has been adjudged illegal by the law of nations. On the other hand, a general order opens the whole trade of the neutral country to every merchant. It pre-supposes
p. 197 no incorporation in enemy | interests: It enables the whole mercantile enterprize of the country to engage upon equal terms with the traffic; and it separates no individual from the general national character. It relaxes the vigor of war, not only in that particular trade, but collaterally opens a path to other commerce. There is all the difference between the cases that there is between an active personal co-operation in the measures of the enemy, and the merely accidental aid afforded by the pursuit of a fair and legitimate commerce.

In the purchase or gratuity of a license for trade, there is an implied agreement that the party shall not employ it to the injury of the grantor; that he shall conduct himself in a perfectly neutral manner, and avoid every hostile conduct. I say there is an implied agreement to this effect, in the very terms and nature of the engagement. I am warranted in declaring this, from the uniform construction put by Great Britain on the conduct of her own subjects acting under licenses. Can an American citizen be permitted in this manner to carve out for himself a neutrality on the ocean, when his country is at war? Can he justify himself in refusing to aid his countrymen who have fallen into the hands of the enemy on the ocean, or decline their rescue? Can he withdraw his personal services, when the necessities of the nation require them? Can an engagement be legal, which imposes upon him the temptation or necessity of deeming his personal interest at variance with the legitimate objects of his government? I confess that I am slow to believe that the principles of national law, which formerly considered the lives and properties of all enemies as liable to the arbitrary disposal of their adversary, are so far relaxed that a part of the people may claim to be at peace, while the residue are involved in the desolations of war. Before I shall believe the doctrine, it must be taught me by the highest tribunal of the nation; in whose superior wisdom and sagacity I shall most cheerfully repose.

It has been said that no case of condemnation can be found on

account of the use of an enemy license. Admitting the fact, I am not disposed to yield to the inference that it is therefore lawful. It is one of the many novel questions which may be presumed to arise out of | the extraordinary state of the world. The silence of adjudged cases p. 198
proves nothing either way: It may well admit of opposite interpretations. The case of the *Vrow Elizabeth*, 5 *Rob.* 2, has been cited by the captors in support of the more general doctrine. It was a case where the ship had the flag and pass and documents of an enemy's ship; and the Court held that the owner was bound by the assumed character. There is no similarity in the case before the Court. The ship and cargo were documented as American and not as British property. As little will the *Clarissa*, (5 *Rob.* 4,) cited on the other side, apply. It was, at most, but a license given by the *Dutch* government, allowing a neutral to trade within its own colony: in all other respects the ship and property were avowedly neutral; and, unless so far as the English doctrines, as to the colonial trade could apply, there was nothing illegal or improper in waving any municipal regulations of colonial monopoly in favor of a neutral. There was nothing which compromitted the allegiance or touched the interest of the neutral country. If, however, this license had conferred on the neutral the special privileges of a Dutch merchant, or had facilitated the Dutch policy in warding off the pressure of the war, it would probably have received a very different determination. See the *Vreede Scholtys*, 5 *Rob.* 5, *note* (*a.*) The *Rendsborg*, 4 *Rob.* 98, 121. We all know that there are many acts which inflict upon neutrals the penalty of confiscation, from the subserviency which they are supposed to indicate to enemy interests; the carrying of enemy dispatches; the transportation of military persons; and the adopting of the coasting trade of the enemy. The ground of these decisions is the voluntary interposition of the party to further the views and interests of one belligerent at the expense of the other: and I cannot doubt that the *Clarissa* would have shared the general fate, but from some circumstance of peculiar exemption.

By the prize code of Lewis XIV. (which I quote the more readily because it is, in general, a compilation of prize law as recognized among civilized nations,) it is a sufficient ground of condemnation that a vessel bears commissions from two different states. *Valin* (*Traité des prises*, *p.* 53,) says, '*A l'égard du vaisseau oú se trouvèrent des commissions de deux différens princes ou* | *états, il est également juste qu'il soit déclaré de* p. 199
bonne prise, soit parce qu'il se peut arborer le pavillon de l'un, en conséquence de sa commission, sans faire injure à l'autre, ceci, au reste, regarde les Français comme les étrangers.' In what consists the substantive difference between navigating under the commissions of our own and also of another sovereign, and navigating under the protection of the

passport of such sovereign which confers or compels a neutral character? *Valin*, in another place (*sur l'ordinance, lib.* 3, *tit.* 9, *art.* 4 *p.* 241,) declares, '*si sur un navire Français il y a une commission d'un prince étranger avec cette de France, il sera de bonne prise, quoiqu'il n'ait arboré que le pavillon Français.*' It is true that he just before observes, '*que ce circonstance de deux congés ou passe-ports, ou de deux connaissements, dont l'un est de France, et l'autre d'un pays ennemi, ne suffit pas seule faire déclarer le navire ennemi de bonne prise, et que cela doit dépendre des circonstances capables de faire découvrir sa véritable destination.*' But *Valin* is referring to the case of an enemy ship having a passport of trade from the sovereign of France. I infer from the language of *Valin*, that a French ship sailing under the passport, *congé*, or license of its enemy, without the authority of its own sovereign, would have been lawful prize.

This leads me to another consideration; and that is, that the existence and employment of such a license affords a strong presumption of concealed enemy interest, or, at least, of ultimate destination for enemy use. It is inconceivable that any government should allow its protection to an enemy trade, merely out of favor to a neutral nation, or to an ally, or to its enemy. Its own particular and special interests will govern its policy; and the *quid pro quo* must materially enter into every such relaxation of belligerent rights. It is, therefore, a fair inference, either that its subjects partake of the trade under cover, or that the property, or some portion of the profits, finds its way into the channel of the public interests.

It has been argued that the use of false or simulated papers is allowable in war as a stratagem to deceive the enemy and elude his vigilance. However this may be, it certainly cannot authorize the use of real papers
p. 200 of a hostile character, to carry into effect the avowed | purpose of the enemy. We may be allowed to deceive our enemy; but we can never be allowed to set up, as such a deception, a concert in his own measures for the very purposes he has prescribed.

An allusion has been made to the passports or safe-conducts granted, in former times, to the fishing vessels of enemies; and it has been argued that such passports or safe-conducts have never been supposed to induce the penalty of confiscation. This will at once be conceded, as to the belligerent nation who granted these indulgences; but as to the other nation, where such passports were not guaranteed by treaty or mutual pacts, I have no authority to lead me to an accurate decision. The French ordinance of 1543 authorized the admiral to make fishing truces with the enemy; and, where no such truces were made, to deliver to the subjects of the enemy, safe-conducts for fishing upon the same stipulations as they should be delivered to French subjects by the enemy. This, therefore, was an authority to be exercised only in cases of reci-

procity; and it seems to have been abolished from the manifest inconveniences which attended the practice. *Valin, sur ord. lib.* 1, *p.* 689, 690. I do not think that any argument in favor of the validity of the present license, (unrecognized as it is by our government,) can be drawn from these ancient examples as to fisheries.

It has been argued that the voyage was lawful to a neutral port, and the mere use of a license cannot cover a lawful voyage with the taint of illegality. This, however, is assuming the very point in controversy. It is not universally true that a destination to a neutral port gives a *bona fide* character to the voyage. If the property be ultimately destined for an enemy port or an enemy use, it is clear that the interposition of a neutral port will not save it from condemnation. 4 *Rob.* 65, 79. *The Jonge Pieter.* Suppose, in the present case, the vessel and cargo had been destined to Lisbon for the express use of the British fleet there, could there be a doubt that it would have been a direct trade with an enemy? Whether the voyage, therefore, be legal or not, depends not merely upon the destination, but the ultimate application of the property, or the ascertained intentions of the party. A contract to carry provisions to St. Bartholomews | for the ultimate supply of the British West India p. 201
islands, would be just as much an infringement of the law of war, as a contract for a direct transportation. On the whole, I adopt, as a salutary maxim of war, the doctrine of Bynkershoek. '*Vetatur quoquo modo hostium utilitati consulere.*' It is unlawful in any manner to lend assistance to the enemy, by attaching ourselves to his policy, sailing under his protection, facilitating his supplies, and separating ourselves from the common character of our country.

I am aware that the opinion which I have formed as to the general nature of licenses, is encountered by the decisions of learned judges for whom I entertain every possible respect. This circumstance alone, independent of the novelty and importance of the question, would awaken in my own mind an unusual hesitation as to the correctness of my own opinion: but, after much reflection upon the subject, I have not been able to find sufficient grounds to yield it; and my duty requires that, whatsoever may be its imperfections, my own judgment should be pronounced to the parties.

I am glad, however, to be relieved from the painful necessity of deciding the more general question, by the peculiar terms of the present license, which I consider as affording irrefragable proof of an illicit intercourse with the enemy, and a direct contract to transport the cargo for the use of the British armies in Spain and Portugal. The very preamble to the license of admiral Sawyer shows this in a most explicit manner, and discloses facts which it is no harshness to declare, are not very honorable to the principles or the character of the parties.

It has been attempted to distinguish the present Claimants from Mr. Elwell, to whom the original license was granted. It could hardly have been expected that such an attempt would be successful. The assignees cannot place their derivative title on a better footing than the original party. They must be considered as entering into the views and contracting to effectuate the intentions of the latter ; and, at all events, the illegality of the employment of the license attaches indissolubly to their conduct. If it were material, however, it might deserve consideration how far an actual assignment is | shown in the case. It rests on the affidavit of one of the Claimants, and on the mere face of papers which carry no very decisive character, and are quite reconcileable with concealed interests in other persons, as the records of prize Courts abundantly show. However, I only glance at this subject, as it in no degree enters into the ingredients of my judgment.

p. 202

A very bold proposition was, at one time, advanced in the argument by the Claimants' counsel, that if this cargo had been actually destined to Portugal for the use of the allied armies of Great Britain and Portugal, or even for the use of the British army, it would not be an offence against the laws of war. In the sequel, if I rightly understand, this proposition, in this alarming extent, was not contended for ; and certainly it is utterly untenable upon the principles of national law.

But it was insisted on, that the British armies in Portugal and Spain were to be considered as incorporated into the armies of those kingdoms, and as not holding the British character.

If I could so far forget the public facts of which, sitting in a prize Court, I am bound to take notice, there is sufficient in the papers before me to prove the contrary of this suggestion. In admiral Sawyer's license and Mr. Allen's certificate they are expressly called the allied armies ; thereby plainly admitting a separate character and organization : and so, in point of fact, we all know it to be ; if, indeed, the British character be not predominant throughout these countries. I reject the distinction, therefore, as utterly insupportable in point of fact.

It has been further argued that, if the conduct be illegal, it is but a personal misdemeanor in no degree affecting the vessel and cargo ; and at all events, that the illegality was extinguished by the termination of the outward voyage. The principles of law afford no countenance to either part of the proposition. If the property be engaged in an illegal traffic with the enemy, or even in an attempt to trade, it is liable to confiscation as well on the return as on the outward voyage : and it may be assumed as a proposition, liable to few, if any, exceptions, | that the property which is rendered auxiliary or subservient to enemy interests, becomes tainted with forfeiture.

p. 203

I cannot but remark that the license in this case, issued within our

own territory by an agent of the British government, carries with it a peculiarly obnoxious character. This circumstance, which is founded on an assumption of consular authority that ought to have ceased with the war, affords the strongest evidence of improper intercourse. The public dangers to which it must unavoidably lead, by fostering interests, within the bosom of the country, against the measures of the government, and the breach of faith which it imports in a public functionary receiving the protection of the government, can never be lost sight of in a tribunal of justice. I forbear to dwell further on this delicate subject.

Upon the whole, I consider the property engaged in this transaction as stamped with the hostile character; and I entirely concur in the decision of the district judge, which pronounced it subject to condemnation.'

The Aurora.—Pike, master.

(8 Cranch, 203) 1814.

The acceptance and use of an enemy's license on a voyage to a neutral port, prosecuted in furtherance of the enemy's avowed objects, is illegal, and subjects vessel and cargo to confiscation.

It is not necessary, in order to subject the property to condemnation, that the person granting the license should be duly authorized to grant it, provided the person receiving it takes it with the expectation that it will protect his property from the enemy. Sailing, with an intention to further the views of the enemy, is sufficient to condemn the property, although that intention be frustrated by capture.

THIS was an appeal from the Circuit Court for the district of Rhode Island.

The following were the material facts of the case:

Some months after the declaration of war, the ship Aurora, documented as American property, and owned by Thomas M. Clarke and Ebenezer Wheelright, the Claimants, who are American citizens, sailed from Newburyport to Norfolk, in ballast. At the latter place she took in a cargo consisting of bread, flour, corn, &c. and sailed from thence on or about the 12th November, 1812, ostensibly for St. Bartholomews, a neutral island belonging to the Swedes, for which port she had obtained her clearance. The cargo was consigned to the supercargo of the ship. p. 204
On the 26th November, 1812, she was captured by the American privateer schooner, governor Tompkins, on the high seas. At the time of capture, she was to the leeward of St. Bartholomews, and had on board a British license, which she exhibited to the captors, supposing them to be British. This license consisted of three documents:

1st. A pass for the West Indies, exclusively, from Andrew Allen, his Britannic majesty's consul residing at Boston; to which is annexed

a copy of a letter, under the consular seal, from admiral Sawyer to Mr. Allen, as follows :

' To the commanders of any of his majesty's ships of war or of private armed ships belonging to his majesty.

' Whereas from a consideration of the great importance of continuing a regular supply of flour and other dry provisions and lumber to the British islands in the West Indies, it has been deemed expedient by his majesty's government, that, notwithstanding the hostilities now existing between Great Britain and the United States of America, every protection and encouragement should be given to American vessels laden with flour and other dry provisions and lumber, and bound to the British islands in the West Indies. And whereas in furtherance of these views of his majesty's government, Herbert Sawyer, esq. vice admiral and commander in chief of his majesty's squadron on the Halifax station, has directed to me a letter under date of the 5th August, 1812, (a copy whereof is hereunto annexed) wherein I am instructed to furnish a copy of his letter, certified under my consular seal, to every American vessel so laden and bound to the West Indies, which is designed as a perfect safeguard and protection to such vessel in the prosecution of such voyage. Now, therefore, in pursuance of these instructions, I have granted to the American ship Aurora, William Augustus Pike, master, burthen 257 47-95ths. tons, now lying in the harbor of Newburyport, and bound to Norfolk for a cargo of flour, corn and other dry provisions for St. Bartho-
p. 205 lomews, the annexed document, to avail only in a direct | voyage to the West Indies and back to the United States ; requesting all the officers commanding his majesty's ships of war, or of private armed vessels belonging to subjects of his majesty, not only to suffer the said Aurora to pass without molestation, but also to extend to her all due assistance and protection in the prosecution of her voyage to the West Indies and in her return to the United States laden with merchandize not exceeding the nett amount of her outward cargo, or in ballast only.

[SEAL.] ' Given under my hand and seal of office this first day of October, 1812,

' ANDREW ALLEN, jun.
His majesty's consul.'

To the above pass was annexed the following copy of a letter from admiral Sawyer certified under the consular seal, and alluded to in the above document.

' *His majesty's ship Centurion,*
At Halifax, the 5th of August, 1812.

' SIR,

' I have fully considered that part of your letter of the 18th ultimo, which relates to the means of ensuring a constant supply of flour and

other dry provisions to Spain and Portugal, and to the West India islands ; and, being aware of the importance of the subject, concur in the proposition you have made.

'I shall therefore give directions to the commanders of his majesty's squadron under my command, not to molest American vessels so laden, and unarmed, *bona fide* bound to British, Portuguese or Spanish ports, whose papers shall be accompanied with a certified copy of this letter, under the consular seal.

'I have the honor to be, sir,
'Your most obedient humble servant,
'H. SAWYER, *Vice Admiral.*

Andrew Allen, esq.
British Consul Boston. |

'*Office of his Britannic Majesty's Consul.* p. 206

I, Andrew Allen, junior, his Britannic majesty's consul for the states of Massachusetts, New Hampshire, Rhode Island and Connecticut, do hereby certify, that the annexed paper is a true copy of a letter addressed to me by H. Sawyer, esq. vice admiral and commander in chief of his majesty's squadron on the Halifax station.

'Given under my hand and seal of office, at Boston, in the [SEAL.] state of Massachusetts, this first day of October, in the year of our Lord, one thousand eight hundred and twelve.

ANDREW ALLEN, jun.'

2d. The following certificate of the Consul :

'*Office of his Britannic majesty's Consul.*

I, Andrew Allen, junior, his Britannic majesty's consul for the states of Massachusetts, New Hampshire, Rhode Island and Connecticut, do hereby certify, that the ship Aurora, Wm. Augustus Pike, being bound to St. Bartholomews (on account of the existing law of the United States, which prevents her return to the United States from a British port) contemplates fulfilling the object comprised in the accompanying license from H. Sawyer, esq. vice admiral and commander in chief on the Halifax station, through a neutral port in alliance with Great Britain.

'Given under my hand and seal of office, at Boston, in the [SEAL.] state of Massachusetts, this second day of October, in the year of our Lord, one thousand eight hundred and twelve.

ANDREW ALLEN, jun.'

3d. The following general pass for the West Indies.

'*Office of his Britannic Majesty's Consul.*

'I, Andrew Allen, jun. his Britannic majesty's consul for the states of Massachusetts, New Hampshire, | Rhode Island and Connecticut, p. 207

request all officers commanding his majesty's ships of war, or private armed ships belonging to subjects of his majesty, to permit the American ship Aurora, William Augustus Pike, master, now lying in the harbor of Newburyport, and furnished with a protection from vice admiral Sawyer, for the purpose of carrying flour, corn, lumber and other necessary provisions to the West Indies, and proceeding to Norfolk in ballast for a cargo, to pass without molestation.

'Given under my hand and seal of office, at Boston, in the [SEAL.] state of Massachusetts, this first day of October, in the year of our Lord, one thousand eight hundred and twelve.

'ANDREW ALLEN, jun.'

The Aurora was carried into Newport, Rhode Island, and there libelled. The Circuit Court of that district condemned vessel and cargo as prize to the captors; from which sentence the Claimants appealed to this Court.

HUNTER, *for Appellants.*

The libel, in this case, sets forth that the sailing was for the purpose of supplying the British West India colonies, and that the papers stating the voyage to St. Bartholomews, were fraudulent and collusive; and urges the condemnation of vessel and cargo, on the following grounds:—

1. That the possession of and sailing with a British license is cause of capture and condemnation.

2. That the voyage of the Aurora was intended as an indirect voyage to a British port, through St. Barts.

3. That the real destination of the ship was to a British port.

On the first point, it is contended, on the part of the Claimants, that
p. 208 the having on board a British license or | pass in a lawful trade to a neutral country, could not, before the act of congress of August 2, 1813, prohibiting the use of British licenses, subject a vessel to capture.

This is clear from the act itself, the operation of which is not to commence from its passage, but, with regard to vessels then in port, was to take effect in five days after the promulgation of the act; with regard to vessels at a distance from the United States, not until the 1st of November; and in some cases not before the 1st of December following. Hence it is evident that the legislature did not consider this act as merely declaratory of the law of nations on the subject, but as then, for the first time, making the use of a British license by an American vessel, illegal. *Laws of U. S. vol.* 12, *p.* 226.

But we are bound to meet the general proposition, which is that the use of such a license gives a hostile character to the property and the voyage.

The doctrine, that any intercourse with the enemy exposes to condemnation, has been supposed to be very ancient; but we find no case

of a decision upon the principle, till the year 1747, when a bill was brought into parliament in consequence of insurance made for enemies. *Parl. debates vol.* 26, *p.* 178. *Sir William Murray's speech, on the subject of insuring enemy property, and* 1 *T. R.* 84, *Gist v. Mason.*

The rule appears to us to be unreasonable and impolitic. Where is the harm of taking advantage of a relaxation of the rights of war by the enemy? How can that be a crime when granted by the policy of the enemy, which would have been no crime if obtained by force—by conquest? It is not less for our own interest to take advantage of such permission from the enemy, than it is for his interest to grant it. It is a public benefit.

The general rule by which to determine the national character of a vessel, is the domicil of the owner. Here, the owners were American citizens. The case of a vessel sailing under the flag or assumed character of a country to which she does not belong, is admitted to be an exception to the general rule. But here was no sailing under such assumed character. All the papers of | the Aurora were American, except the one in question, p. 209
which cannot of itself be sufficient to give a hostile character to the holders of it, nor to the vessel and cargo. 1 *N. Y. T. R.* 64, *Jenks v. Hallet and al.—Chitty's law of nations* 58.—*Case of the Clarissa cited in* 5 *Rob.* 4. *The Vrow Elizabeth.*

The only prohibition, existing at the time of the sailing of the Aurora was to take a license to a British port. That was prohibited by the act of July 6th, 1812, § 7.

By that act, we admit, all commercial intercourse with the *enemy*, was rendered unlawful; but we contend that it was not unlawful to use a British license in a *neutral* voyage. 1 *Rob.* 167, 200. *The Hoop.*

Suppose Great Britain should think proper to permit a particular neutral trade—suppose she were even to protect it by convoy—are we bound to refuse to accept such permission—such protection?

Valin laughs at the English for restoring, in the form of insurance, the captures made by their cruizers; but does not censure the French merchant for taking it.

The voyage in this case was not *made* by the license, but merely made *safer* by it. The voyage was certainly lawful without it: and a license to pursue a voyage which was lawful without it, cannot make that voyage unlawful. *Pamphlet of cases decided in the District Courts of Pennsylvania and Massachusetts, p.* 80, 81. *Judge Davis' opinion on the use of British licenses. Judge Peters' opinion.*—1 *Vez.* 317. *Duponceau's Bynk.* 166.

On the second point, viz. That the voyage of the Aurora was intended as an indirect voyage to a British port through St. Barts, it is contended by the Claimants, that there is no evidence to justify the fact assumed.

Was this a *bona fide* voyage to St. Barts? On the decision of this point the whole case turns. In discussing this question all the circumstances of the case should be taken into consideration. *Vid. Portalis'*
p. 210 *opinion in the case of the Pigou, contained in a note to the case of the* | *Charming Betsey*, 2 *Cranch*, 98. *Vid. also Ch. J.* MARSHALL'S opinion in the case of the *Matilda* decided in North Carolina. *Hall's law journal*, 487.

With respect to those circumstances attending the transaction, which, on first view, are perhaps calculated to excite a suspicion that this was not a *bona fide* voyage to St. Barts, it may be observed, that it was the object of the Aurora to deceive the enemy, and thereby obtain an exemption from capture, during the voyage, by inducing him to suppose that the cargo was ultimately intended for the British. Such an imposition, in a case like the present, we conceive was justifiable.

What motive could the Aurora have had for sailing to a British island rather than to St. Barts? At a British island, she could only take in a cargo of rum; and the importation of such a cargo was prohibited by our own laws. At St. Barts, she could take in a general West India cargo. Motives of interest, therefore, would have induced her to go to the latter place rather than the former.

But suppose the *intention* was to go to a British port; was that intention executed? It was not. But according to the decision in the case of *the Abby*, 5 *Rob.* 254, there must be an *act* of trading as well as an *intention*, in order to subject the vessel to condemnation.

On the third point, which, it is presumed, constitutes the stress of the case, we contend that the real destination of the Aurora was not to a British port, and that the condemnation on the ground of a British supply being intended and proceeded in, is erroneous and against proof.

That the supply of the British West Indies was the object of admiral Sawyer in granting the license, we do not deny: but what *his* intention was, is perfectly immaterial: such was not our intention in accepting it. Our object was to escape capture; and with that view we obtained a license from the enemy, by inducing him to believe that we intended to furnish supplies to his islands. |

p. 211 What is said by Allen, the consul, is mere surplusage: his authority extended no farther than to certify admiral Sawyer's letter: having done this, he was *functus officio*. But suppose the license granted by Allen to have been valid, it was only for a voyage to St. Barts, and would not have protected the Aurora in any other voyage: *That* was the voyage *insured*.

J. WOODWARD, *contra*.

With regard to the act of *August* 2, 1813, which has been said, by the counsel for the Claimants, to prove that the use of British licenses, previous to the passage of that act, was not unlawful, we are still of

opinion that the act is merely in affirmation of the law of nations. It is also cumulative—it adds penalties to what was before unlawful; but does not make any thing unlawful which was not so before. The latter clause in the 3d sec. of the act, providing ' that nothing contained in the said act shall be so construed as to arrest or stay any prosecutions,' &c. was intended to guard against the construction which the Claimants have now attempted to give it. The several periods of time allowed to vessels in different situations, to obtain notice of the act, were allowed them in order that they might be enabled to avoid the *new* penalties.

Trading with the enemy was an indictable offence at common law. 2 *Rolle's Abr.* 173, but it was necessary for congress to fix the penalty for trading on *land*: this they have accordingly done in the act of July 6, 1812. By the course of the admiralty, the thing itself was liable to forfeiture for trading with the enemy.

The British papers on board the Aurora shew a case of *supply;* and therefore the question of pass or license is immaterial. The pass was expressly for the purpose of supplying the enemy.

But suppose the papers do not prove a case of supply, the use of the license on the high seas is, of itself, sufficient to give the property a hostile character. The license in this case is essentially different from a general license by an order in council. *There* no special favor—no particular benefit, is granted. |

The use of a hostile protection in the prosecution of a neutral trade, p. 212
gives a hostile character to the voyage. Sailing under a hostile convoy is good ground of condemnation; sir William Scott denominates it ' *illicit protection.*' Sailing under two commissions is also cause of condemnation. *Valin, p.* 241, *b.* 3, *art.* 9. All these cases are analogous to the present. The Aurora was sailing under the physical force of the enemy. Admiral Sawyer's letter requires the British naval force to assist her in the prosecution of her voyage. She must, therefore be considered as having placed herself under the protection of the enemy, and as having, consequently abandoned her national character.

Trading with an enemy was cause of forfeiture at common law; and whatever was cause of forfeiture at common law, is good cause of condemnation in the admiralty. 2 *Rob.* 82, 69. *The Walsingham Packet.*

The case of *Jenks v. Hallet and al.* cited by the Claimants, is not applicable to the present case: we were not then at war with France.

Sir William Scott, in the case of *the Vigilantia,* 1 *Rob.* 11, 13, has laid it down as a known and established rule, that if a vessel is navigating under the pass of a foreign country, she is considered as bearing the national character of that nation under whose pass she sails. Now what was the license in question but such a pass?

The license is not a document under the law of nations. The granting

of it is the exercise of a municipal right—a prerogative to the crown. The king, however, has no right to grant licenses to any but his own subjects, without a particular act of parliament authorizing him so to do: There is no case in which he has granted a license to strangers without such an act of parliament. If a license be granted without such authority, the person who takes it can take it only as a *subject. Chitty's law of nations*, 256.—*id.* 316.—2 *Roll. Abr.* 173, *tit. Prerogative.*—1 *Rob.* 199, 200. *The Hoop.*—2 *Tucker's Bl. Com.* 258.—*Chitty's law of nations*, 278.—*Reeves*, 358.

p. 213 Any commercial intercourse, direct or indirect, with | the enemy, is illegal, and cause of condemnation: its illegality does not depend on contract. The intervention of a neutral port makes no difference. 8 *T. R.* 555. *Potts v. Bell and al.*—4 *Rob.* 68, 69, 83, 84. *The Jonge Pieter.*—1 *Rob.* 165, 196. *The Hoop.*—*Chitty's law of nations*, 13, 14, 15.

When the Aurora was taken, she was out of the course to St. Barts, and very far to the leeward of that island. These circumstances afford a strong suspicion that her destination was to some other port.

The return cargo was British produce, and, *prima facie*, British property: if it was not, it is on the Claimants to shew it.

It appears that the captain was kept ignorant of the real destination of the Aurora, and that the supercargo, during his examination *in preparatoria*, was guilty of prevarication. These circumstances alone are good cause of condemnation. *Chitty's law of nations*, 314.

As to what has been said with regard to the intention not being carried into effect, we contend that it was carried into effect to every legal purpose. An overt-act was sufficient to constitute the offence; and sailing with the license was such an overt act.

PINKNEY, *on the same side.*

The rule, that trade with the enemy is illegal, results necessarily from the declaration of war, and is included in it: There was no necessity for any subsequent law to enforce the rule.

It has been said that no judicial decision on this subject is to be found of an earlier date than 1747. It is true sir William Scott, in his enumeration of cases where this question was agitated has gone no farther back than that date: but *sir John Nicholls*, in his argument in the case of *Potts v. Bell*, has cited cases from *sir Edward Simpson's MS. reports in the admiralty*, where this principle was decided to be correct as early

p. 214 as 1704, and 1707; and it is to be presumed that those | decisions were founded upon former cases. See also 1, *Vez.* 317, *Henkle v. the Royal Ex. In. Co. in* 1749.

The general rule is above all impeachment.

This case may be considered, as it regards,

1st. The license alone.

2d. The license as connected with the transaction itself.

First, then, we contend that no American citizen, in a time of war, has a right voluntarily to place himself under the protection of the enemy. War exists between the nations in their political capacity, and between the individuals of each nation respectively. The power of making peace follows the power of making war. Individuals cannot lawfully make peace even for themselves. But the acceptance of a license from the enemy is making a peace with him so far as it goes—it is a partial truce—a partial cessation of hostilities. Transactions of this kind are productive of great evil. The American citizen who accepts a license from the enemy, does that which is highly injurious to the interests of his country: The indulgence of the enemy imposes on him an obligation to act as a neutral, contrary to his duty as a citizen—it is an individual bribe—it has a tendency to poison the whole virtue and patriotism of the country—to undermine the government—to alienate the affections of the citizens, and to place the nation in the power of the enemy.

The circumstance, that acts of congress have been passed prohibiting trade with the enemy, the use of his licenses, &c. has been urged by the Claimants, as evidence that such communication with the enemy was not unlawful prior to the passage of those acts. But we contend that it was unlawful under a well established rule of the law of nations; and that if these acts have not repealed that rule, they cannot aid the Claimants in the present case. *Sir Wm. Scott's* observations in the case of *the Hoffning*, are in point. 2, *Rob.* 137, 165.

But we have a special answer to the argument of the | Claimants. p. 215
The act of July 6, goes upon the presumption that the intercourse with the enemy which it prohibits, was before unlawful—it does not profess to create a new offence.

Considering, then, this point as settled, the argument, that the act of 6th July prohibits the use of licenses to trade with *British* ports only, falls to the ground.

The case of *ransom* has been said to militate with the argument we have employed in support of the illegality of sailing under the protection of the enemy. But the cases are widely different. In a case of ransom, the captured vessel is compelled to make an agreement with the enemy—she is under the necessity of accepting their protection—here the transaction was perfectly voluntary.

The rule of 1756, declaring illegal the coasting trade permitted by the enemy in time of war, which was prohibited by him in time of peace, is founded upon the same general principle. If, then, the *permission* only of the enemy gives a hostile character to vessels sailing under that permission, *a fortiori*, they acquire a hostile character by sailing under the *protection* of the enemy.

But suppose the Claimants in this case did not mean to aid the

British, but merely to benefit themselves at the expense of their country and their fellow citizens—still the object of the *license* and the obvious consequence of the voyage, was the supply of the British West Indies. This the Claimants must have known. They knew, also, that the pressure of the West Indies was one of the means which the United States were using to coerce the enemy: yet they become the agents of the British to prevent this pressure. If a neutral carry despatches for one of the belligerent powers, it affords just cause of condemnation to the other: How much stronger is the case of a citizen of one of the belligerent nations furnishing the other with supplies.

It has been said that here was only an *intent* to commit an illegal
p. 216 act, (supposing the act contemplated to | be illegal,) that there was no *corpus delicti*. But we contend that the very act of sailing with a view to execute the intention, constitutes the offence. Such is the law in case of blockade: if a vessel sails for a blockaded port, knowing it to be blockaded, she thereby acquires a hostile character.

We might here contend that the real destination of the Aurora was not to St. Barts, but to a British port; for it appears that, when captured, she was 160 miles to the leeward of that island: but it is unnecessary to say any thing on this point, as the principle is the same, and the vessel equally liable to condemnation, whether her destination were to a British port or to St. Barts: in the latter case, the cargo, it was well known, would be obtained by the enemy from the Swedes; so that it was, in effect, the same thing as if it had been carried direct to the enemy.

DEXTER, *in reply*.

It is the *universality* of the rule in question we mean to controvert—we deny that there is *such* a general rule. It is not to be found in *Puffendorf, Grotius, Vattel* or any of the other jurists excepting *Bynkershoek*, whose rules of war are written in blood: and even he has qualified the rule—he says himself that the rule prohibiting all commercial intercourse is done away by the laws of commerce. *Valin* only shows that a particular intercourse is forbidden by the law of France; and, in noticing British insurance, he does not condemn the French for procuring it. The case of *Potts v. Bell* proves that the doctrine in question has but recently been introduced: it is, however, in that case admitted with the exception of those cases where the royal license has been obtained: but this exception must be taken as part of the rule itself: The general principle without the exception would be ruinous to the nation: The inconveniences which would arise from it are incalculable. In 1747, lord Mansfield and sir Dudley Ryder were of a different opinion as to the policy of the rule, and as to the principle of law.

In *Henkle v. the Royal Ex. As. Co.* lord Hardwicke said 'It might
p. 217 be going too far to say that all trading | with an enemy is unlawful; for

'the general doctrine would go a great way even where only *English* 'goods were exported, and none of the enemy's imported, which may 'be very beneficial.'

In this country there has been no decision to establish the rule; and if we take the British rule, we must take it with the power of dispensation: but the president has no such power: the sovereignty has been said to reside in the people: but the remedy by application to congress would be too slow and uncertain. We must conclude, therefore, that in this country no such rule exists.

It has, nevertheless, been contended, by the counsel for the captors, that the rule not only exists, but that it is universal. Is a man, then, bound to abandon all his property which may happen to be in the enemy's country at the breaking out of a war? Such would be the consequence of taking the rule without any exception. Some cases of intercourse with the enemy, it is true, are so palpably illegal as to admit of no doubt on the subject; such as all traiterous intercourse, and perhaps a direct trade; so, also, if the intercourse be in consequence of a new enterprize undertaken since the commencement of hostilities: but many cases must necessarily occur, on the breaking out of a war, which ought certainly to form exceptions: Such is the doctrine in England, where the excepted cases are provided for by the royal license permitting intercourse with the enemy, under certain circumstances and with certain restrictions. In a country, then, where licenses cannot be obtained, all cases where they *would be* granted if a power of granting them existed, must be cases of judicial exception to the general rule. Many occasions may and frequently do occur, during war, on which such intercourse with the enemy would be highly expedient in a political view—occasions where the public good requires an exception; and those, too, cases neither of necessity nor humanity, which must always be excepted.

It is not necessary to inquire whether the mere acceptance of a license is ground of condemnation; it is the *sailing* under a license which constitutes the offence: but | in our case there was no sailing under the p. 218
license. The license authorized a voyage to a British, Portuguese or Spanish port: the voyage in the present case was to a port belonging to the Swedes: the letter of Allen, the consul, which has been said to authorize a voyage to a Swedish port also, is entitled to no regard. Admiral Sawyer's letter was the only protection: all the acts of Allen, except certifying that letter, were unauthorized and unofficial; they were no protection to the Aurora. Allen's letter shows, on the face of it, that the voyage to St. Barts was not covered by the license; it merely expresses an opinion that that voyage would answer the purposes contemplated by the British government as well as a voyage to a British port.

It has been said that the real destination of the Aurora was to a

British port; and in support of the position, the circumstance of her being considerably to the leeward of St. Barts, when captured, has been urged in proof; but the argument deserves little consideration; it is a very common thing to fall to the leeward: besides, it appears that the Aurora had been beating to the windward three days before she was captured, although when she first made the land, there were numerous British ports under her lee.

It has also been argued on the part of the captors, that a transshipment from St. Barts to an enemy port was intended: but there is no evidence even of this: nor was there any motive for such transshipment: the cargo would meet with as ready a sale at St. Barts as at a British island: the superior advantage of taking in a return cargo at the former place has been already noticed.

But it is said that it was equally criminal to carry this cargo to St. Barts as to a port of the enemy, because the Swedes would probably dispose of it to the British. This argument, also, we conceive to be wholly without foundation: no decision to that effect has ever been pronounced: the case of the island of St. Eustatius, in the last war goes to prove the reverse of this doctrine.

Nothing, therefore, as we conceive, having been proved, on the part
p. 219 of the captors, sufficient to subject the | property in question to condemnation, we trust that the Court, on the consideration of the whole case, will decree restitution to the Claimants.

*Monday, March 7th. Absent....*TODD, *J.*

LIVINGSTON, *J.* delivered the opinion of the Court.

The ship Aurora and cargo, owned by the Claimants, who are American citizens, and documented as American property, were captured, on the 26th of November 1812, by the private armed ship Governor Tompkins, on an ostensible destination for St. Bartholomews. From the documents on board and the preparatory examinations, it appears that the ship sailed from Newburyport to Norfolk, in ballast, took in her present cargo, consisting of bread, flour, corn, &c. at the latter place, and sailed from thence on the voyage on which she was captured, on or about the 12th of November, 1812. The cargo was consigned to the supercargo of the ship; and the destination thereof upon the ship's papers, supported by the preparatory examinations, was St. Bartholomews, for which island the ship obtained her clearance. At the time of capture, she was to the leeward of that island; and certain passports or protections from the agents of the British government were found on board, which are familiarly known by the title of British licenses; which documents are as follows.[1]

[1] See the statement at the beginning of the report of this case.

Two questions have been made at bar. 1. Whether the acceptance and use of an enemy's license or passport of protection, on a voyage performed in furtherance of the enemy's avowed objects, be illegal, so as to affect the property with confiscation. 2. If so, whether there is any thing in the present case, to exempt it from the general principle.

The first point having just been decided in the affirmative, in the Julia, it only remains to enquire whether there be any thing in this case to exempt it from the general principle.

In the opinion of a majority of the Court, it is not easy to discriminate between these cases: both of the vessels | had licenses or passports of p. 220
the same character, and substantially for the same purpose, except only that the object of the Julia was to supply the allied armies in Portugal, and the original intention of the Aurora was to go to the British West Indies. It is by no means clear that this destination was ever changed; but admitting that, from an apprehension of seizure in case of her returning to the United States after touching at a British port, she, in fact, sailed on a voyage to St. Bartholomews, this can make no substantial difference in her favor. Her object in going there was equally criminal, and subserved the views of the enemy nearly if not quite as well as if her cargo had been landed in a British island; of the real design of the voyage there can remain no doubt; for it abundantly appears, from the license itself, that the professed object of admiral Sawyer at least, in granting it, was to obtain a supply of provisions for the enemy; and the Court will not easily lend its ear to a suggestion, that notwithstanding the Aurora was found with a British protection on board, of so obnoxious a character, yet her owners intended to deceive the enemy, either by going to a port not mentioned in it, or by disposing of her cargo in a way that would not have promoted his views. Without meaning to say that such conduct may under no circumstances whatever be explained, the Court thinks that there is no proof, in this case, to shew that it was not the intention of the Claimants to carry into effect the original understanding between them and Mr. Allen. For although the destination to St. Bartholomews be conceded, it is evident that Mr. Allen, who acted as British consul, supposed the views of admiral Sawyer might be answered as well in that, as in any other way; nor is it clear, as was said at bar, that the documents which were received from Mr. Allen, which varied more in form than in substance from the admiral's passport, would not have protected her against British capture, on a voyage to that island. The protection of admiral Sawyer extended to unarmed American vessels laden with dry provisions, and *bona fide* bound to British, Portuguese or Spanish ports. The only modification, or extention, introduced by Mr. Allen, was a permission to go to a Swedish island, equally neutral with Spain and Portugal, in the vicinity of the

British possessions. Whether all or any of these papers would have saved the Aurora from confiscation in a British Court of admiralty,
p. 221 this Court is not bound | to assert ; it is sufficient if that were the reasonable expectation of the parties, as it certainly was, and it is more than probable that such expectation would have been realized, considering the very important advantage which the enemy was to derive from them. In case of capture, there can be no doubt that the Claimants would have interposed these very papers, which are now supposed to have emanated from unauthorized agents, and probably with success, as a shield against forfeiture. Why then, should they be permitted to allege here, that they would have been ineffectual for that purpose ?

It is also insisted, that, in this case, no illicit intercourse had actually taken place ; that the whole offence, if any, consisted in *intention ;* and that if a capture had not intervened, there was still a *locus penitentiæ*, and no one can say that even a project of going to St. Bartholomews might not have been abandoned. In this reasoning the Court does not concur ; but is of opinion that the moment the Aurora started on the voyage for St. Bartholomews, with the license in question and a cargo of provisions, she rendered herself liable to capture by the public and private armed ships of the United States, who were not bound to lay by and see how she would conduct herself during the voyage, the consequence of which would be that no right of capture would exist until all chance of making it were at an end.

Judgment affirmed.

The Adventure. ——, master.

(8 Cranch, 221) 1814.

The case of a vessel and cargo, belonging to a citizen of one belligerent nation, captured on the high seas by a cruizer of the other belligerent, given to a neutral, and by him brought into a port & libelled in a Court of his own country, between which and the nation to which the vessel originally belonged war breaks out before final adjudication, is to be considered as a case of salvage. One moiety adjudged to the libellants and the other moiety to remain subject to the future order of the Court from which the appeal was brought up ; and to be restored to the original owner after the termination of the war, unless legislative provision should previously be made for the confiscation of enemy's property found in the country at the declaration of war.

The act of bringing in the cargo, though consisting of articles the importation of which was prohibited by law, was not considered, under the peculiar circumstances of this case, as subjecting the property to forfeiture.

THIS was an appeal from the decree of the Circuit Court for the district of Virginia.

The facts of the case, as stated by JOHNSON, *J.* in delivering the opinion of the Court, were as follow :

The Libellants were the master and crew of the American brig '*Three Friends.*' On the 14th November, 1811, whilst on their voyage from Salem to the Brazils, | with a valuable cargo on board, they were captured p. 222
by the Nymphe and Medusa, French frigates, and by them the brig was plundered and burnt. On the 21st, the frigates captured the '*Adventure,*' a British ship laden with British goods; and, after taking out a part of the cargo, made a present of the residue to the Libellants. The fact of the gift is established by a writing under the hand of the captain of the Medusa, commander of the squadron, in which he says, 'Je donne au capitaine,' &c. in the language of an unqualified donation. On the 23d November, they left the squadron, and arrived at Norfolk on the 1st of February, 1812, after a long and boisterous voyage in a large ship navigated by a very inadequate crew. On her arrival in the United States, she was libelled by the captain and crew as their property acquired under the donation of the French captor; and the United States interposed a claim for the forfeiture incurred under the non-importation act. At the time of her arrival, peace existed between this country and Great Britain: but on the 18th of June following, and pending this suit, war was declared.

PINKNEY, *for the Libellants,*

Said it was not his intention, at this time, to inquire whether or not this be a case for condemnation under the non-intercourse act of March 1, 1809; He did not mean to deny that it is *not.* Waving that question, therefore, for the present, he contended that the property in controversy is either, a *droit of admiralty* subject to salvage, or that it is to be considered as derelict. But no evidence has been produced in support of the latter supposition. It must therefore be considered as a case of the former description, and a case too, of the most meritorious character.

If this be conceded, the next question is, what rate of salvage shall be allowed? The English rule on this subject is fixed only in the case of re-capture by government ships and privateers. The salvage allotted to the first, is at the rate of one eighth of the beneficial interest in the whole re-captured property; to the last, one sixth. In all other cases, the judge of the Court is at liberty to order such salvage as he shall deem reasonable. Sometimes | the whole property saved is allowed— p. 223
sometimes the moiety only, and sometimes less. The present case is one of *extraordinary* merit.

In the Court below, two points were made in behalf of the United States:

1. That this was a case of forfeiture under the non-intercourse act of 1st of March 1809; and if not, then,

2. That it was a case of salvage, and the rate to be allotted discretionary with the Court.

JOHNSON, *J.* here suggested a doubt whether it was not a case under the non-intercourse act; and asked whether the United States could rightfully seize the property in question as a *droit of admiralty*, in port, or any other British property on the land. He also observed that there might be some difficulty with regard to the allotment of salvage, should this prove to be a case of that kind.

HARPER, *for the Libellants.*

On a capture of a vessel, the right of the captors is only inceptive: In order to complete that right, it is necessary to prosecute it to the condemnation of the vessel in a Court of competent jurisdiction. In the present case, the French captors transferred their right, whatever it was, to the American master and crew. Could they lawfully do this? The decision of the question depends upon the doctrine relative to the transfer of a *chose in action.* We contend that they could; and that the transferrees were consequently entitled, as captors, to prosecute the original capture.

But if the Libellants are not entitled as captors, then it is a question whether it be a case under the non-intercourse act, or a case of salvage.

In order to bring it within the meaning of the non-intercourse act, it must be shown that there was an intention to import for sale or use —that there was a *voluntary* importation, and that the importation was
p. 224 from a foreign port or place. But here, there was no such intention, here was no *voluntary* importation; and no importation, as we conceive, from any *foreign port or place* within the meaning of the act; here was no intention to infract any law whatsoever; it was a case of clear necessity: the master and crew were obliged to bring in the ship to save their own lives.

But it may perhaps be said that though it was necessary to bring in the ship, it was not necessary to bring in the cargo. What then was to be done with it. Was it to be thrown into the sea? The British owner was not divested of his right. Such an act, therefore, would have been inconsistent with the neutral character which it was the duty of all Americans to preserve towards Great Britain, with whom we were then at peace. We conceive that the course pursued by the Libellants, was unexceptionable. They proceeded openly to the United States, and, immediately on their arrival, delivered up the property to be disposed of according to law. There is no appearance, throughout the whole transaction of the smallest intention to violate any law whatever.

It must, therefore, be considered as a case of salvage; and had the relations between Great Britain and the United States continued as they were at the time of the importation, the residue of the property in question, after deducting the salvage, must have been restored to the British owner.

But the declaration of war has altered the nature of the case: The ship and cargo have now become enemy property, and, as such, are claimed by the American government, subject, however, to the right of the libellants.

What salvage is to be allotted to us, the Court will decide. Our case is certainly one of great merit: we were, for more than two months, exposed to the perils and hardships of a long and boisterous voyage; and that, too, in a large ship to the management of which the small crew on board was by no means adequate. Less than half the amount of the property would not we conceive, compensate us for the trouble and danger we have incurred. |

PINKNEY, observed that he had not considered this as a case coming p. 225
within the meaning of the non-intercourse act, and had therefore waved the discussion of that point: he still doubted whether there were sufficient grounds to support it. The law only prohibits importations from a *foreign port or place*. In cases of trans-shipment, it may perhaps be said that the property trans-shipped is imported from a foreign place: but here was no trans-shipment, no change of vessel: here the property is imported from the *high seas*, which can hardly be considered as coming within the description of a foreign port or place. He did not mean, he said, to enter into a formal argument. He would, however, observe that, in his opinion, the captors, in the present case, could not complete their right to the property in question by means of a neutral master and crew, even if the British owner was divested of his right.

RUSH, *Attorney general*, conceived that the high seas might be considered as a foreign place; that the cargoes of whale-ships from the Pacific, such as oil, whalebone, blubber, &c. which originate from the sea, might be considered as within the meaning of the non-intercourse act. He suggested that the word *place*, in the act, was probably used in contradistinction to *port*.

MARSHALL, *Ch. J.* In the Circuit Court the high seas were considered as common to all nations, and, of course, *foreign* to none.

PINKNEY, said this was a case of very considerable difficulty. How is the property to be disposed of? It cannot be decreed to the United States, for it is not a case under the non-intercourse act, nor was the seizure *jure belli*: A prize Court had no jurisdiction: for the seizure was in time of peace, for a supposed violation of the non-intercourse law, and after the property was landed: It cannot be decreed wholly to the Libellants, because it must be considered as a case of salvage. Nor can it be restored to the original owner, because he is an alien enemy.

*Monday, March 7th. Absent....*TODD, *J.*

STORY, *J. did not sit in this cause, some distant relative of his having an interest in it.* |

JOHNSON, *J.* after stating the facts of the case, as before mentioned, p. 226
delivered the opinion of the Court as follows:

The very peculiar circumstances of this case require the application

of a variety of principles ; and the Court has not been aided in its enquiries, by that elaborate discussion which such novel cases generally elicit. But they are relieved by the reflection, that the principles to which they must resort in forming their judgment are well established, and lead satisfactorily to a conclusion.

The most natural mode of acquiring a definite idea of the rights of the Libellants in the subject matter, will be, to follow it through the successive changes of circumstances by which the nature and extent of the rights of the parties were affected. The capture, the donation, the arrival in the United States, and the state of war.

As between the belligerents, the capture undoubtedly produces a complete divesture of property. Nothing remains to the original proprietor but a mere *scintilla juris*, the *spes recuperandi*. The modern and enlightened practice of nations, has subjected all such captures to the scrutiny of judicial tribunals, as the only practical means of furnishing documentary evidence to accompany ships that have been captured, for the purpose of proving that the seizure was the act of sovereign authority, and not mere individual outrage. In the case of a purchase made by a neutral, Great Britain demands the production of such documentary evidence, issuing from a Court of competent authority, or will dispossess the purchaser of a ship originally British—(*the Flad Oyen*, 1 *Rob.* 135.) Upon the donation, therefore, whatever right might, in the abstract, have existed in the captor, the donee could acquire no more than what was consistent with his neutral character to take. He could be in no better situation than a prize-master navigating the prize, in pursuance of orders from his commander. The vessel remained liable to British capture on the whole voyage. And, on her arrival in a neutral territory, the donee sunk into a mere bailee for the British Claimant, with those
p. 227 rights over the | thing in possession which the civil law gave for care and labor bestowed upon it.

The question then occurs, is this a case of salvage ?

On the negative of the proposition it is contended, that it is a case of forfeiture, and therefore not a case of salvage as against the United States—that it was an unneutral act to assist the enemy in bringing the vessel *infra presidia*, or into any situation where the rights of re-capture would cease, and therefore not a case of salvage as against the British Claimant.

But the Court entertain an opinion unfavorable to both these objections.

This could never have been a case within the view of the legislature, when passing the non-importation act. The ship was the plank on which the ship-wrecked mariner reached the shore ; and although it may be urged that bringing in the cargo was not necessarily connected with their own return to their country, yet, upon reflection, it will be found, that

this also can be excused upon very fair principles. It was their duty to adhere strictly to their neutral character; but to have cast into the sea the cargo, the property of a belligerent, would have been to do him an injury by taking away that chance of recovery subject to which they took it into their possession. Besides, bringing it into the United States, did not necessarily pre-suppose a violation of the non-importation laws. If it came within the description of property cast casually on our shores, as we are of opinion it did, legal provision exists for disposing of it in such a manner as would comport with the policy of our laws. At last, they could but deliver it up to the hands of the government, to be re-shipped by the British Claimant, or otherwise appropriated under the sanction of judicial process. And such was the course that they pursued. Far from attempting any violation of the laws of the country, upon their arrival here they deliver it up to the custody of the laws, and leave it to be disposed of under judicial sanction. The case has no one feature of an illegal importation, and cannot possibly have imputed to it the violation of law. |

As to the question arising on the interest of the British Claimant, p. 228
it would, at this time, be a sufficient answer, that they who have no rights in this Court, cannot urge a violation of their rights against the claim of the Libellants. But there is still a much more satisfactory answer: To have attempted to carry the vessel '*infra presidia*' of the enemy, would, unless it could have been excused on the ground of necessity, have been an unneutral act. But when every exertion is made to bring it to a place of safety, in which the original right of the captured would revive and might be asserted, instead of aiding his enemy, it is doing an act exclusively resulting to the benefit of the English Claimant.

It being determined to be a case of salvage, the next question is, as to the amount to be allowed. On this subject there is no precise rule: nor is it, in its nature, reducible to rule. For it must, in every case, depend upon peculiar circumstances, such as peril incurred, labor sustained, value decreed, &c. all of which must be estimated and weighed by the Court that awards the salvage. As far as our enquiries extend, when a proportion of the thing saved has been awarded, a half has been the *maximum*, and an eighth the *minimum*; below that, it is usual to adjudge a compensation *in numero*. In some cases, indeed, more than a half may have been awarded; but they will be found to be cases of very extraordinary merit, or on articles of very small amount. In the present case, the account sales of the cargo was near $16000; and we are of opinion that the one half of that sum will be an adequate compensation.

The next question arises on the application of the residue. On this point, the Court is led to a conclusion by the following considerations.

At the arrival of the vessel in the United States, the original British

owner would, unquestionably, have been entitled to the balance. The state of war, however, at present, prevents his interposing a claim in the Courts of this country. But as this property was found within the United States at the declaration of war, it must stand on the same footing with other British property similarly situated. Although property of
p. 229 that description is liable to be disposed of by the legislative | power of the country, yet, until some act is passed upon the subject, it is still under the protection of the law, and may be claimed after the termination of war, if not previously confiscated. We will, therefore, make such order respecting it, as will preserve it, subject to the will of the Court, to be disposed of as future circumstances shall render proper.

As to the mode of distributing the amount of the salvage, the Court have concluded to adopt an arbitrary distribution ; because there exists no positive rule on that subject. They would have adopted the rules of the prize act relative to cases of salvage, had the circumstances of the case admitted of its application.

This Court orders and decrees, that the decree of the Circuit Court of Virginia, in this case, be reversed ; that the costs and charges be paid out of the proceeds of the sale ; that the one half of the balance be adjudged to the Libellants, to be divided into thirteen and a half parts, three of which shall be paid to the captain, two to the supercargo, two to the chief mate, one and a half to the second mate, and one to each of the seamen. And that the balance be deposited in the bank of Virginia, to remain subject to the future order of the Circuit Court.

The Venus.—Rae, master.

(8 Cranch, 253) 1814.

If a citizen of the United States establishes his domicil in a foreign country between which and the United States hostilities afterwards break out, any property shipped by such citizen before knowledge of the war, and captured by an American cruizer after the declaration of war, must be condemned as lawful prize. Upon a shipment of goods to be sold, on joint account of the consignee & shipper, or of the latter alone at the option of the consignee, the right of property does not vest in the consignee until he has made his election under the option given him. If two partners own jointly a commercial house in New York, & one of them obtains an American register for a ship by swearing that he, together with his partner, of the city of New York, merchant, are the only owners of the vessel for which the register is obtained, when in fact his partner is domiciled in England, the vessel is liable to forfeiture under the act of congress of December 31st, 1792. Laws U.S. vol. 2, p. 133.

APPEAL from the sentence of the Circuit Court for the district of Massachusetts.

The following were the facts of the case, as stated by WASHINGTON, *J.* in delivering the opinion of the Court.

This is the case of a vessel which sailed from Great Britain, with a cargo belonging to the respective Claimants, as was contended, before the declaration of war by the United States against Great Britain was or could have been known by the shippers. She sailed from Liverpool on the 4th of July, 1812, under a British license, for the port of New York, and was captured on the 6th of August, 1812, by the American privateer Dolphin, and sent into the district of Massachusetts, where the vessel and cargo were libelled in the District Court.

The ship, 100 casks of white lead, 150 crates of earthen ware, 35 cases and 3 casks of copper, 9 pieces of cotton bagging, and a quantity of coal, were claimed by Lenox and Maitland.

198 packages of merchandize and 25 pieces of cotton bagging were claimed by Jonathan Amory, as the joint property of James Lenox, William Maitland and Alexander | M'Gregor; not distinguishing the pro- p. 254
portions of each: but the 25 pieces of cotton bagging were afterwards claimed for M'Gregor as his sole property, and also 5 trunks of merchandize.

21 trunks of merchandize were claimed by James Magee, of New York, as the joint property of himself and John S. Jones, residing in Great Britain.

The District Court, on the preparatory evidence, decreed restitution to Magee and Jones, and also to Lenox and Maitland, except as to the 100 casks of white lead; as to which, and as to the claim of M'Gregor, further proof was ordered.

From this decree, so far as it ordered restitution of the merchandize to Magee and Jones, and to Maitland, and of the ship to Lenox and Maitland, the captors appealed to the Circuit Court, where the decree was affirmed *pro forma*, and an appeal was taken to this Court.

In April, 1813, the cause was heard on further proof in the District Court; and in August the claim of M'Gregor was rejected, as well as that of Lenox and Maitland to the white lead. But at another day, on a further hearing, the Court ordered restitution to M'Gregor of one fourth of the property claimed by him, and condemned the other three fourths as belonging to his partners, being British subjects. Both parties appealed, as did also Lenox and Maitland in relation to the white lead. A *pro forma* decree of affirmance was made, from which an appeal was taken to this Court.

Maitland, M'Gregor and Jones were native British subjects, who came to the United States many years prior to the present war, and, after the regular period of residence, were admitted to the rights of naturalization. Some time after this, but long prior to the declaration of war, they returned to Great Britain, settled themselves there, and engaged in the trade of that country, where they were found carrying

on their commercial business at the time these shipments were made,
p. 255 and at the time of the capture. Maitland is yet | in Great Britain, but has, since he heard of the capture, expressed his anxiety to return to the United States; but has been prevented from doing so by various causes set forth in his affidavit. M'Gregor actually returned to the United States some time in May last—Jones is still in England.

PITMAN, *for the captors.*

In relation to the several claims set up in this case, it will be contended, on the part of the captors, 1st. That they are to be determined, as it respects the capacity to claim, by the national character of the Claimants at the time of the capture. If the Claimants, *at the time of capture*, were British subjects the property is undoubtedly liable to condemnation.

It is admitted, on all hands, that the Claimants, Maitland, M'Gregor and Jones, had acquired a domicil in Great Britain at the time of the declaration of war; and were actually domiciled in that country at the time of the capture: they must, therefore, be considered as British subjects, in reference to the property claimed by them respectively. Nor will an intention to return to the United States, if that intention be not manifested until *after the capture*, be of any avail; for it is a principle in prize law, that the national character of property, during war, cannot be altered, *in transitu*, by any act of the party subsequent to the capture.

The following cases are considered as going to establish the foregoing positions: 1 *Rob.* 97, 115. *The Herstelder. id.* 90, 107. *The Danchebaar Africaan.* 5 *Rob.* 257. *The Boedes Lust.* 3 *Rob.* 17, 12. *The Indian Chief.* 1 *Rob.* 12, 14. *Cases cited by sir W. Scott in the Vigilantia.* 2 *Dallas*, 42. *Sloop Chester v. Brig Experiment.* 3 *Rob.* 29. *The Indian Chief. Livingston and al. v. the Maryland Ins. Co. decided in the Supreme Court of the United States at the last term.* 3 *Bos. and Pul.* 207. *Case of the Franklin cited in note.* 3 *Rob.* 37, 38. *The Citto.* 5 *Rob.* 60. *The Diana.* 2 *Rob.* 265, 323. *The Harmony.* 5 *Rob.* 270. *The Jonge Classiná.*

It appears that Maitland has, since he heard of the capture, expressed
p. 256 his anxiety to return to the United | States; and that M'Gregor did actually return. But we contend, upon the principle above stated, that neither the intention of Maitland, although formerly naturalized in this country, nor the actual return of M'Gregor, inasmuch as they did not take place till *after the capture*, can avail for the purposes of their respective claims.

And even if it should be proved that Maitland's intention to return existed previous to the capture, it would not avail him, if nothing more than intention could be proved. The case of the *President*, 5 *Rob.* 277, is in point: it is there decided that an *intention* to return is of no avail,

unless that intention be evidenced by some overt-act. Here no such overt-act, on the part of Maitland, is proved. The following cases go to establish the same point: 3 *Rob.* 37, 38. *The Citto. Curtisos' case cited in* 5 *Rob.* 65. *The Diana, and in* 3 *Rob.* 17, 12. *The Indian Chief.* As to M'Gregor, vid. 3 *Rob.* 264, 322. *The Harmony.*

M'Gregor's return to America, after capture of the vessel, will not avail him unless he can prove,

1st. That he had, previous to the capture, set himself in motion to return.

2d. That he had done so with a *bona fide* intention of remaining in America.

3d. That he had no intention of returning to England.

Vid. the case of the *Indian Chief*, 3 *Rob.* 17, 12.

But the national character of these parties, Maitland, M'Gregor and Jones, does not depend upon domicil. They were originally native subjects of Great Britain; and, after being naturalized in this country, they returned to England, and resumed their native allegiance, in violation of their oath of naturalization. By this conduct we contend that they lost the character of American citizens, and could not, *flagrante bello*, resume it for the mere purpose of protecting their property. In a Court of the law of nations, as well as by the navigation laws of the United States, they cannot but be considered | as British subjects. In p. 257
the case of *La Virginie*, 5 *Rob.* 98, *sir W. Scott* said, 'It is always to be 'remembered, that the native character easily reverts, and that it re-'quires fewer circumstances to constitute domicil in the case of a native 'subject, than to impress the national character on one who is originally 'of another country.'

It is not necessary to contend against the doctrine of expatriation. We do not deny the right. We contend only that in order to render his naturalization valid for the purposes in question, a man must expatriate himself *bona fide*, must remove from his original country and not return to it, *animo manendi*. In support of this doctrine, *vid. the act of congress of March* 27, 1804. *Laws of U. S. vol.* 7, *p.* 146—also *act of* 31*st December*, 1792, § 2. *Laws U. S. vol.* 2, *p.* 132. 3 *Dallas*, 153, *Talbot v. Jansen.*

The British doctrine on this subject is well known. '*Once a British subject, always a British subject*,' is an established rule in the English law. Great Britain respects the naturalization laws of the United States only for commercial purposes. If one of her subjects be naturalized in this country, and afterwards return to a British territory, she considers him as still, *to all intents and purposes*, a British subject. She does not even require him to abjure his adopted allegiance.

It is to be presumed that Maitland, M'Gregor and Jones knew the laws of their own country: yet with this knowledge they returned to

England; and that, as it appears from their subsequent conduct, not for a temporary purpose merely, but *animo manendi*. They have established there a house of trade. They have placed themselves and their property under the protection of Great Britain, and cannot now, with any show of reason, claim protection from the United States, although the United States may still claim something from them. 2 *Cranch*, 120, *Murray v. Schooner Charming Betsy*.

It is evident, from all the circumstances of the present case, that Maitland did not intend to return to the United States until he heard of
p. 258 the capture of the vessel: | on the contrary, it appears that, with a full knowledge of the war, he made his election to remain in England.

When M'Gregor left England for the United States, he embarked as a British subject. His passport was from the privy council, and signed by lord Sidmouth; whereas American citizens obtained their passports from the alien office. He is still a partner in a house of trade in England —he is engaged in a *British* trade. It remains for these parties to explain their conduct. We have stated the facts, and the burden of proof now lies on the Claimants. Such would be the rule even if they were neutrals. 3 *Rob.* 37, 38. *The Citto.* 4 *Rob.* 191, 232. *The Dree Gebroeders.* 1 *Rob.* 88, 104. *The Bernon.* 1 *Rob.* 12, 15. *The Vigilantia.* 3 *Rob.* 40, 41. *The Portland.* 5 *Rob.* 91. *The Ocean.* 2 *Rob.* 264, 322. *The Harmony.*

In attempting to establish the national character of these Claimants, as American citizens, it was said in the Court below, that they held landed property in this country. This argument is overthrown by the decision in the case of the *Dree Gebroeders* cited above; 4 *Rob.* 194, 235.

2. It appears that M'Gregor has fraudulently attempted to cover the whole property in question; his claim, therefore, being false in part, he cannot recover even his own share, although we should admit him to be an American citizen. The whole, therefore, is justly liable to condemnation. 2 *Rob.* 212, 257. *The Susa.* 1 *Rob.* 210, 250. *The Odin.* 2 *Rob.* 281, 343. *The Rosalie and Betty.* 3 *Rob.* 92, 109. *The Graaf Bernstorf.* 4 *Rob.* 65, 74. *The Jonge Pieter.*

3. As to the claim of Lenox and Maitland to the ship, we contend, 1st. That, under the act of congress of March 27, 1804, (*Laws U. S. vol. 7, p.* 146) she cannot be considered as an American vessel. By that act it is declared 'That no ship or vessel shall be entitled to be registered as a ship or vessel of the United States, or, if registered, to the benefits thereof, if owned in whole or in part by any person naturalized in the
p. 259 United States, and residing for more than one year in | the country from which he originated, &c. But Maitland had been residing in England more than a year, and consequently was not entitled to an American register. 2d. That Lenox being found in violation of the law, as it respected the ship's register, he is not *rectus in curia* for the purpose of

claiming the ship. Vid. the cases cited in the *Rapid*, on this point: viz. 2 *Rob.* 72, 77. *The Walsingham Packet.* 5 *Rob.* 28, 32. *The Cornelis and Maria.* 6 *Rob.* 348. *The Recovery.* 3d. That Lenox and Maitland having attempted to conceal enemy's property, (the 100 casks of white lead) and to withdraw the same from the belligerent rights of the United States by a fraudulent shipment and claim, their claims to the property captured therewith must be rejected, and the penalty of confiscation attaches to the same. This principle is intended to be applied to the claim of Maitland as well to the cargo as to the ship.

There can be no reasonable doubt that the lead belonged to some person or persons other than the Claimants. The following facts are considered as conclusive on this point.

1. The original bill of parcels enclosed in a letter dated 3d July, 1812, from Wm. Maitland & Co. to Lenox and Maitland, is headed thus: 'Thomas Holloway bought of Thomas Walker, Malby & Co. lead merchants,' and is dated at Liverpool, June 2d, 1812.

2. In the bill of lading of the goods claimed as the property of Lenox and Maitland, in which the white lead is included, the *freight* and *primage* is cast upon the lead in the margin of the bill of lading, and not upon the crates, copper, bagging, or coal.

3. To a letter from Maitland to Lenox of 22d August, 1812, found on board the Lady Gallatin, is annexed a list of goods shipped by Wm. Maitland & Co. by the Venus, on account of and consigned to Messrs. J. Lenox and Wm. Maitland. In this list all the goods claimed by Lenox and Maitland, and by Lenox, Maitland and M'Gregor, are enumerated, *except the white lead.*

4. Upon the order for further proof in the District | Court, no further p. 260
proof was offered respecting the lead. Maitland, in his affidavit made January 7th, 1813, in Liverpool, swears that the copper, crates, coals and bagging were purchased and shipped on board the Venus, on the sole account and risk of himself and Lenox: he also swears as to their joint property with M'Gregor: *but says not a word about the lead.*

From these circumstances we must conclude that the white lead was the property of Thomas Holloway, an acknowledged British subject; that it is therefore liable to condemnation, and subjects the property captured with it to the same fate.

4. In respect to the claim of Magee and Jones, we contend that at the time of capture the property belonged solely to Jones, a British merchant and subject, and is therefore to be condemned as enemy property.

In the bill of lading of these goods, they are expressed to be shipped by M'Gregor & Co. unto and on account of James Magee & Co. of New York. The invoice is signed by Jones, at Manchester, and describes

them as goods to be shipped on board the Venus, and to be consigned to James Magee & Co. of New York; but does not specify on whose account and risk. It is therefore to be considered as at the risk of Jones. Vid. on this point, the case of the *Marianna*, 6 *Rob.* 27.

In a letter from John S. Jones to James Magee & Co. dated at Manchester, 1st July, 1812, he says, 'This serves to hand you invoice of 21 trunks prints per Venus, amount 1,323*l.* 13*s.* 0*d.* subject to the same terms as the goods per Aristomenes; that is, to be sold on joint account, *or on mine at your option.*' Now, to effect a change of property, it is essential that there be a contract of sale agreed to by both parties. Here appears to have been no such contract. The property, therefore, at the time of capture, was exclusively in Jones.

If Jones had a right to stop these goods *in transitu*, so had the United States, who, by the laws of war, succeeded to his rights. 6 *Rob.* 127. *The Constantia. The Copenhagen*, 1 *Rob.* 245, 291, is an analogous case. |

p. 261 STOCKTON, *contra*, for *M'Gregor*, contended,

1st. That M'Gregor, to the exclusion of his partners, Lenox and Maitland, was owner of *one half* of 198 packages of Manchester goods, and one half of 25 pieces of cotton bagging, and to *the whole* of five trunks of goods.

2d. That these goods were not the goods of an enemy, and ought to be restored to M'Gregor as an American citizen.

In support of the first point, he relied on the ship's papers, on certain letters of Maitland & Co. and of M'Gregor himself, on the affidavits of M'Gregor in the Court below, &c. He contended that the testimony on this point, introduced since the evidence *in præparatorio*, was incompetent; but if competent, not important. The cause was heard in September, 1812, and further proof allowed for the Claimants; but no such order on the part of the captors, nor any order to proceed by *plea and proof*. The cause stood, on their side, on the proof taken *in præparatorio*. The evidence introduced by them is upon simple affidavit. 1 *Rob.* 263, 313. *The Adriana. Letter from sir W. Scott and sir J. Nicholl to Mr. Jay*, 1 *Rob.* (*Amer. ed.*) *p.* 8.

Second point. As to the national character of M'Gregor. He came to the United States a minor; was an established merchant in New York before 1795; he was then naturalized; he married in New York, and purchased a house there before his departure for England, which he still retains: he has also purchased large tracts of land in the states of New York and New Jersey, which he yet owns: he resided about twelve years in New York. His return to England was produced by temporary causes. In 1798 he returned thither on account of the sickness of his wife, who died in Scotland. His second return was for his own health. In 1805 he commenced business in Liverpool as an American

merchant. His employment was that of an American merchant shipping goods from England, and receiving American produce to sell there on commission. His *residence* in England was in *time of peace:* it was lawful, and could in no manner impair his rights as a | citizen of the United p. 262
States. He had no intention to abandon his American rights, or to remain permanently in England; but intended to return to the United States whenever his duty should require him to return. Such a residence, *in time of peace*, could not stamp a hostile character upon him; and, at the breaking out of war, he was entitled to a reasonable time to depart from the British dominions, before he could forfeit his American character and become identified with the enemy. He did depart therefrom, and returned to the United States with his family within a year after the declaration of war. His having formed a connexion in trade with British partners was a lawful act, which did not derogate from his American character, but extended and facilitated his business as an American merchant.

Congress did not mean to authorize the capture of property belonging to mere *inhabitants* of the hostile country. When the bill to authorize the president to issue letters of marque was brought into the senate of the United States in June, 1812, it authorized him to issue them against all persons *inhabiting* in Great Britain or its territories or possessions; but was amended in the senate so as to authorize him to issue them only against the united kingdom of Great Britain and Ireland and the *subjects* thereof. *See the secret journal of the senate for June*, 1812.

Many cases have been cited by the counsel for the captors in his endeavor to prove this a case for condemnation. The answer to most of them is, that the controversy in those cases was between neutrals and belligerents; not between Great Britain and her subjects. The two cases are entirely different in principle. The connexion between a citizen and his government depends on the municipal law of the land. The rights of a neutral depend upon the law of nations.

With regard to the doctrine of naturalization, it is well known that, by the law of England, a person naturalized by act of parliament is as much a subject, to all intents and purposes, as a native. *Co. Lit.* 129, *a. Bl. Com. B.* 1, *c.* 10, *p.* 374. M'Gregor, we have seen, was naturalized in the United States. But it is said that he has returned to his former allegiance, and thereby | lost his American character. This we deny. p. 263
He returned to England in time of peace, by which we contend he neither forfeited nor abandoned his character as an American citizen. Our act of naturalization contains nothing to authorize the opinion that he did. Nor could he throw off his adopted allegiance if he would. If found in arms against us he would be punished as a traitor.

The act of March, 1804, which has been cited by the captors, merely

declares that a naturalized citizen shall lose one particular privilege of his citizenship by residing for more than a year in the country from which he originated; from which the implication is clear, that he shall retain all his other privileges.

In the case of the *Charming Betsy*, 2 *Cranch*, 64, and in the case of *M'Ilvaine v. Coxe's lessee, decided in* 4 *Cranch*, 211, the decision of this Court was, that residence in a foreign country does not deprive an American citizen of his rights as such. It has been decided, also, that by such residence in time of peace, the national character is not changed upon the sudden breaking out of a war. Residence in time of peace is lawful; and if the person so residing return to his own country in a reasonable time after the breaking out of the war, he does not lose his original national character. 1 *Bos. and Pul.* 442, *Marryat v. Wilson. Vattel, B.* 1, *c.* 19, § 218, *p.* 169. *Sir W. Scott* has never said that such a residence would, on the sudden breaking out of a war, give a hostile character to the resident: he has never gone so far as to condemn property situated like that now in question. 5 *Rob.* 90. *The Ocean.*

Vattel (*B.* 3, *c.* 4, § 63, *p.* 477) says, that the sovereign declaring war is to allow those subjects of the enemy who are within his dominions at the time of the declaration, a reasonable time for withdrawing with their effects: and certainly a nation ought not to grant less indulgence to its own citizens than the enemy allows them. I trust this Court is not yet prepared to adopt, even with respect to neutrals, much less with regard to American citizens, the rigid rules of the British Court of admiralty—a mere political Court—a prerogative Court regulated by the
p. 264 king's orders in council, | designed to give Great Britain the sovereignty of the ocean, to subject the whole commerce of the world to her grasp, and to make the law of nations just what her policy would wish it to be.

It is doubtful whether the Court ought to condemn, under the circumstances of the present case, although it should be proved that the property in question was enemy property.

The shipment, in the present case, was made on the faith of the representations of the American charge d'affaires, Mr. Russel; who had given it as his opinion that property shipped after the repeal of the British orders in council, and before knowledge of the war, would be admitted into the United States. Under these circumstances the conduct of the owners of this property was perfectly justifiable. It has been decided in a British Court, that property which comes into the possession of a nation under the public faith, is not liable to forfeiture, and Congress has virtually acknowledged the same principle, by passing the act of *27th February*, 1813, remitting the forfeitures which had accrued under the non-intercourse act of March 1, 1809. *Laws U. S. vol.* 11, *p.* 388. *Vid. Mr. Russell's statement in the report of the committee*

of congress....journal of H. of Rep. and the *case of the Althea, cartel,* which was captured at Halifax as American property, and discharged by *judge Croke, because it came into the possession of the British under the public faith.*

PITMAN, as to the objection to the invocation of papers from other Courts, cited the following authorities: *14th Interrogate,* 1 *Rob.* (*Amer. ed.*) 323. 6 *Rob.* 351. *The Romeo.* 4 *Rob.* 170, 205. *The Convenientia.* 1 *Rob.* 27, 31. *The Magnus.* 2 *Rob.* 2, 3. *The Eenrom. id.* 211, 254. *The Susa. id.* 281, 343. *The Rosalie and Betty.* He observed that there was an order, in the Circuit Court, for further proof on the part of the captors, saving the question whether it were a case for further proof.

HARPER, for *Lenox* and *Maitland* and *Jones* and *Magee.*

Lenox and Maitland claim, |

1st, The ship Venus. p. 265

2d. As their joint property, the white lead, crates, copper, cotton bagging and coal.

3d. One moiety of 198 packages of merchandize and cotton bagging, as the joint property of Lenox and Maitland and Alexander M'Gregor, and shipped by them.

Magee and Jones claim 21 trunks of prints, part of the cargo of the Venus, as their joint property.

Lenox and Maitland are natives of Scotland. They removed many years since to New York, where the former was naturalized on the 10th of November, 1794, and the latter on the 8th of July, 1804. They entered into partnership in trade in 1797, and established their house in New York, in which they were alone interested, under the name and firm of J. Lenox and W. Maitland; which has continued to the present time. For fourteen years they both resided, without interruption, in the city of New York, carrying on the business of their American house, as American citizens; and, as such, they hold valuable real estate in the city and in the state of New York, and also hold American registered ships. Lenox still resides in New York; but Maitland, in July 1810, to promote the interest of their commercial establishment in New York, by attending the sales of the shipments to Europe and the returns to America, went to Liverpool, in England, where, in 1811, he took a house and counting-room and transacted business for the said concern, under the name and firm of W. Maitland and Co. consisting only of said Lenox and Maitland. He has long since given up his counting-room and attempted to dispose of his house; and is still in England, detained there by sickness. In July, 1812, and long before and at the time of the capture of the Venus by the Dolphin, Lenox and Maitland were the sole owners of the said ship under an American register. The Venus sailed from Liverpool for New York, on the 4th of July, 1812, with a cargo of British produce and manufactures,

the proceeds of the funds of Lenox and Maitland, with instructions to
p. 266 wait off the Hook, to know if the goods could be landed. Proceeding | with her cargo on this voyage, she was captured and libelled as has been before stated.

James Magee was naturalized 9th August, 1803, and has ever since resided and been established in New York.

John S. Jones was naturalized 10th December, 1795, and resided in New York thirteen years. In 1810, he went to Manchester (England,) and arrangements were made for shipping goods to Magee, the partner in New York.

It has been contended, on the part of the captors, with regard to the ship, that, by the laws of the United States, she is not to be deemed an American ship, nor entitled to the benefits of an American register, on account of the residence of Maitland in Liverpool for more than a year.

Admitting, for the sake of argument, that this position is correct, still we contend that the ship is not forfeited. She has merely incurred the disability attached to a foreign ship. Her owners are still American citizens, but have lost the privilege of availing themselves of the register. It is contended, however, that this very disability which attaches to the ship, renders her belligerent property. This is truly a novel doctrine. There is no law by which it can be supported.

As to the right of Lenox to his share of the ship, there can be no reasonable doubt. He is certainly an American citizen and has done nothing to forfeit that character. He has been naturalized in this country, and has continued to reside here ever since. It is said, however, that he has made a false claim to the white lead. This point will be considered in the course of the argument.

Maitland, it is true, has been residing in England for a considerable time past; and it is upon this ground that the ship and cargo are claimed by the captors. They contend that his residence in England (although an American citizen) clothes him with a hostile character. |

p. 267 To this it may be answered, that the residence which imparts a hostile character must be residence connected with some act of commerce blended with the commercial transactions of the enemy. Mere residence does not give a hostile character, so long as the resident refrains from all voluntary acts tending to the aid and comfort of the enemy. If he engages in the enemy's commerce, he must, to be sure, be considered as an enemy; but even then, only to the extent of the commercial property engaged in the hostile trade, which may chance to be captured. A man in an enemy's country may send home books or furniture purchased before the war for his own use, and they will not be hostile property. There must be a *trading* with the enemy to constitute an offence. Trading is *essential; time* is not. A mere continuation in an enemy's country after the com-

mencement of hostilities, without any act of trade, has never been decided to constitute a man an enemy. *Sir W. Scott* himself allows a person found in the enemy's country, a reasonable time to withdraw his effects, and even to *trade* with the enemy so far as it may be necessary for the removal of his property. 3, *Rob.* 17, 12. *The Indian Chief.* 4, *Rob.* 161, 195, *Madonna delle Gracie.* 1, *Rob.* 165, 196, *the Hoop.*

But it is said, that though an illegal act should be proved to have been committed by Maitland, yet that Lenox has been guilty of making a false claim to part of the cargo, which act of Lenox has criminally affected the property of Maitland.

We answer, that the doctrine on the subject of covering enemy property, applies only to neutrals ; but Lenox was a citizen of the United States. Besides, it does not by any means appear, that, in making this claim, Lenox was influenced by a fraudulent motive. His conduct was, in all probability, owing to mistake. He had not seen the letters and papers proving the property, claimed by him, to belong to the enemy ; and therefore cannot be supposed to have known that fact.

It is further urged by the captors, that a letter by the Lady Gallatin, of 22d August, 1812, shows that a purchase of 100 bags of cotton was made by Maitland, after knowledge of the war. |

To the admissibility of the invoked papers, among which this letter is one, we have already objected, and must still insist upon the objection. Setting aside those papers, it does not appear that Maitland did purchase the cotton after knowledge of the war : and the presumption ought to be in his favor. But suppose this single purchase was made one day after war was known to exist, (which is all the captors contended for) is this sufficient to fix a hostile character, especially under circumstances like those attending this transaction, when it was universally supposed that the repeal of the orders in council would have put an end to the war ? p. 268

With regard to Jones, it has only been proved that he was residing in England a few months after the commencement of hostilities ; but there is no evidence that he has not returned ; nor is there any evidence of his having traded with the enemy. The burthen of proof lies on the captors.

DEXTER, *in reply.*

In cases like that now before the Court, the advantage in obtaining evidence is clearly on the side of the Claimants. They have in their power the knowledge of all the facts relative to the case. The evidence *in præparatorio* consists of the documents on board the ship, and the testimony of the crew. They may make out their own case. If the evidence in their favor be deficient, they may have an order for further proof, which does not give the captors any opportunity of introducing further evidence on their part. Under circumstances so manifestly advantageous, if the Claimants do not fully prove their case, the presumption must be

against them. Whether the Claimants in the present case have satisfactorily done so, it is for the Court to decide.

With regard to the question of domicil. *Sir W. Scott* has decided that the *animus manendi* is to be presumed under circumstances perfectly analogous to those of the present case. What are the facts with regard to the several parties whose claims are now disputed ? M'Gregor, it appears, is a native of Scotland : he became a citizen of the United States by naturalization, in 1795, and resided at New York until 1802, except
p. 269 a temporary | visit to his native country, for the health of his wife. In 1802, he left New York for his own health, and in 1804, established himself in a house of trade in Liverpool (England) in connexion with James Dennistown, a British subject. Two other partners were afterwards admitted, both British subjects. M'Gregor was the only one of the partners who resided in Liverpool, and was the acting partner of the concern. He married a second wife in Great Britain, and had several children there, during his residence in Liverpool.

These facts are abundantly sufficient to establish his domicil.

The question, then, remains—did he take timely and sufficient steps, after knowledge of the war, to divest himself of his British character, and return to the United States ? This does not appear. On the contrary, it appears from papers invoked and introduced into this cause, and it is not contradicted, that he continued his connexion with his British partners ten months after the declaration of war, and, as acting partner of the house, made a shipment to Halifax. He has not, in any of his affidavits, declared that he did not continue his trade. The testimony on his part does not deny all secret trusts. He comes into Court well informed of the suit, yet without the books, articles of partnership, original bills of parcels, and the other papers connected with the transactions under consideration.

It has been urged in his defence, that being a commission merchant, having the property of others in his hands, and being the only acting partner of the firm, he was justified in remaining in England till he could wind up his business. But this is no sufficient justification. The contracts of a citizen residing abroad, must be consistent with the interests of his country. If the good of his country requires his return, as in the event of war, it is his duty to leave his business in other hands. M'Gregor might have left his affairs to the care of his partners.

Most of the facts with regard to Maitland have been already stated. It may be added, however, that he continued to reside in England and
p. 270 was transacting business | there as late as April, 1813 ; whereas the war was known on the 24th or 26th of July, 1812. In his letter of the 22d of August, 1812, in which he informs his partner of a purchase of cotton wool he had just made, he says nothing of any intention of returning to the United States.

His continuance in England is defended on nearly the same grounds as that of M'Gregor; viz. his extensive mercantile concerns. Sickness was not alleged by him as an excuse, till 13th April, 1813.

As to the goods shipped by Jones, it has already been observed, that, in his letter to Magee of 1st of July, 1812, he gives him his option either to be interested in them or not. Of course, at the time of the shipment, they were the sole property of Jones; and before the letter was received by Magee—before there was a possibility of his making an election, the goods were captured; but it is an acknowledged rule of prize law, that the character of goods cannot change *in transitu*; at the time of capture, therefore, they were the sole property of Jones, and must, we contend, be condemned *in toto*.

Besides the particular circumstances which have been urged in justification of the individuals concerned in this cause, a general defence has been set up; viz. That though the property in question should be determined to be British, yet it came here under the faith of the nation; and is therefore entitled to protection. *Vattel*, it is said, lays down this doctrine. This is not denied. But did the property in controversy come into the country under the national faith? It was not here at the breaking out of hostilities. It was not brought into the country until after the declaration of war; and then it was brought in as a prize of war. Besides, if it was considered as protected on this principle, why was the attempt made to cover it under the name of M'Gregor? This has a suspicious appearance; and shows clearly that the Claimants themselves placed little reliance on the circumstance which is now urged in their defence.

As to the objection to the admission of the invoked papers, it need only be observed that the counsel for the | Claimants is under a mistake on p. 271
the subject. There was an order for further proof on the part of the captors; and under that order these papers were invoked.

The great question of law on the subject of domicil yet remains to be examined.

Three classes of residents are recognized by the law of nations.

1st. Mere residents.

2d. Domiciled residents.

3d. Natural born subjects.

Before entering upon the discussion of the main question, I would remark, with regard to some observations which have fallen from the counsel for the Claimants respecting the severity of the rules adopted by the British Court of admiralty, that these rules have been applied by *sir W. Scott* with equal rigor, to British subjects as to neutrals; which is a sufficient answer to the allegation that they have been introduced merely to subserve the grasping policy of the British nation, and destroy all neutral commerce.

With regard, then, to the first class of residents. It is admitted that mere residence in a foreign country, for a particular temporary purpose, without engaging in the commerce of the country, is not sufficient to change the national character.

2d. Residence in a foreign country connected with the carrying on a general trade and mixing in the commercial affairs of the nation, constitutes *domicil*; thereby making a man, *sub modo*, a subject of that foreign country: and in case of war breaking out between his original and adopted country, if he continues, notwithstanding, to reside and trade in the latter, he is to be considered by his original country, as invested with a hostile character to all intents and purposes. He ought not, it will be admitted, to be considered in this light immediately on the declaration of war: he ought, perhaps to be allowed a reasonable time to make his election
p. 272 whether to remain where he is or return to his own country. Respectable authorities, however, have said that, if required, he is bound to return. *Sir W. Scott* says he is bound immediately to put himself in motion to return.

3d. As to *mere* native subjects, it is needless to make any remarks. The persons whose national character is now in question are natural born subjects of Great Britain, naturalized in the United States, and who afterwards returned to the country of their nativity. These persons, we contend, are, even without the intervention of a war, as much British subjects as if they had never been naturalized in another country. The British government had a right to prevent their return to the United States. In saying this, we would not be understood as admitting the legality of impressment; the cases are materially different.

The naturalization law of the United States requires permanent *residence*: and no longer than that residence continues, can a man claim the privileges of naturalization. Before he can be admitted to those privileges, he must abjure all allegiance to the state of which he was before a citizen. By so doing, he binds himself not to return to that state. By returning he violates his oath; and can thereafter claim no protection from the country which he has thus abandoned. Abjuration does not absolve him from his former allegiance; he may incur new duties, but he cannot swear away his old obligations. It is for this Court to explain the true meaning of the law of naturalization. It may, however, be observed, that neither the constitution nor the laws of the United States consider a naturalized citizen in the same light as a native. The laws of Great Britain, also, and indeed the laws of every country, make a distinction between the two. A native is considered as a citizen wherever he goes; but a person naturalized is no longer looked upon as a citizen, than while he continues in his adopted country. No nation confers the privilege of naturalization without an equivalent. No nation extends

its protection to naturalized subjects, if they return to their former country. And shall we be an exception? Shall we be the first to extend to naturalized foreigners this Quixotic protection? |

The expression '*ad fidem utriusque regis*,' from *Calvin's case*, has p. 273
been mis-translated, 'the faith of *both* kings.' Had that been the meaning of the phrase it would have been *utrumque regum*, in the plural: The meaning is, that a man may be the subject of either power according to his residence. Were the doctrine, that he may be the subject of both, correct, he would have it in his power to enjoy the privileges of both governments, without being subject to the duties of either.

With regard to the false claim of Lenox. It is a rule of prize law, that a man who makes a false claim to protect enemy property, forfeits any property of his own that may be captured with it. This Lenox appears to have done with respect to the white lead. If he has, not only his own property is forfeited, but that of Maitland his partner must share the same fate. What has been said by the counsel for the Claimants to exculpate Lenox, is mere conjecture.

As to the ship. It is clear that the register was improperly obtained —not to say *fraudulently*. Maitland, by residing in England, was not entitled to an American register. Lenox, by concealing, when on oath, the fact of Maitland's residence in England, becomes *particeps criminis*, and if he mixes his interest with that of his partner, the same decree must be rendered as to the property of both.

STOCKTON, with regard to the withholding of papers with which M'Gregor was taxed by the counsel on the opposite side, stated that the decree of the Court below was only rendered in October last, when M'Gregor had the first intimation that the papers were required; since which, there had not been time to obtain them.

*Saturday, March 12th. Absent....*LIVINGSTON. *J.*

WASHINGTON, *J.* after stating the facts of the case, delivered the opinion of the majority of the Court as follows:

The claims of Maitland, M'Gregor and Jones are resisted, *in toto*, upon an objection to the national character of the Claimants. The general question affecting | these parties, will, for the present, be post- p. 274
poned in order to dispose of particular objections which are made to all the claims, either in whole or in part, and which will depend on the particular circumstances applying to those cases.

1. The first claim that will be considered will be that of Lenox and Maitland to the 100 casks of white lead, which, it is contended, is the property of Thos. Holloway, an acknowledged British subject, but shipped in June, 1812, by Wm. Maitland & Co. (a house established in Liverpool, and composed of Wm. Maitland and James Lenox) to Lenox

and Maitland, a house established at New York, and composed of the same parties. To establish the fact of property in Thos. Holloway, the captor relies upon the following evidence : The original bill of parcels, enclosed in a letter under date of the 3d of July, 1812, from Wm. Maitland & Co. to Lenox and Maitland, which is headed thus, ' Thos. Holloway bought of Thomas Walker & Co. lead merchants,' dated June 2d, 1812. In corroboration of this *prima facie* evidence of property in Holloway, the freight and primage of this lead is cast in the margin of the bill of lading, but not so upon the acknowledged property of Lenox and Maitland, the owners of the ship, and included in the same bill of lading ; from which circumstance it is argued that this article did not belong to Lenox and Maitland ; since, if it did, no freight could have been charged on it, any more than upon the other parts of the cargo claimed by them. In addition to this, in a list of goods shipped by Wm. Maitland & Co. by this vessel, on account of and consigned to Lenox and Maitland, and enclosed in a letter of the 22d August, 1812, from the former to the latter, by the Lady Gallatin, all the goods claimed by that house separately, and also by them and M'Gregor jointly, are enumerated, except this parcel of white lead. This evidence is certainly very strong to fix a hostile character on this property ; and is rendered conclusive by the omission of Maitland, in his affidavit made under the order for further proof, to say any thing in relation to the white lead, although he is very particular as to all the other property claimed by Lenox and Maitland,
p. 275 and by that house jointly with M'Gregor. This Court is | therefore of opinion that the Court below did right in rejecting this claim.

2. The next claim to be considered, is that of Magee and Jones to a part of the cargo on board of this vessel. Magee is a citizen of the United States, settled in New York, and connected with Jones in a house of trade. It is urged by the captors that the whole of this property ought to have been condemned as the sole property of Jones. The bill of lading of these goods expresses them to be shipped by M'Gregor & Co. unto and on account of James Magee & Co. of New York. The invoice is signed by Jones, at Manchester, in England, and describes them as goods to be shipped on board the Venus, and to be consigned to James Magee & Co. of New York ; but it does not specify on whose account and risk. In a letter from Jones to Magee, dated the 1st of July, 1812, covering an invoice of these goods, he says ' they are to be sold on joint account, or on mine at your option.' The whole question, as to the exclusive property of Jones in these goods, is rested, by the captors, upon the above expressions giving an option to Magee to be jointly concerned or not in the shipment. The question of law is, in whom the right of property was at the time of capture ? To effect a change of property as between seller and buyer, it is essential that there should

be a contract of sale agreed to by both parties ; and if the thing, agreed to be sold, is to be sent by the vendor to the vendee, it is necessary to the perfection of the contract that it should be delivered to the purchaser or to his agent, which the master, to many purposes, is considered to be. The only evidence of a contract, such as is now set up, appears in the affidavit of Magee ; who states that, in 1810, he was in England, and agreed with Jones that the latter should ship goods on joint account, when the intercourse between the two countries should be opened ; and that, in consequence of this agreement, the present shipment was made. Now admit that such an agreement was made, yet the delivery of the goods to the master of the vessel was not for the use of Magee and Jones, any more than it was for the use of the shipper solely ; and, consequently, it amounted to nothing so as to divest the property out of the shipper, until Magee should elect to take them on joint account, or | to act as the agent of Jones. Until this election was made, the goods p. 276 were at the risk of the shipper, which is conclusive as to the right of property.

3. The next claim is that of Lenox and Maitland to the ship. The facts in relation to this subject are, that James Lenox, as joint owner with W. Maitland of this ship, obtained, in November, 1811, a register for her, which was granted upon his oath, that he, together with W. Maitland, *of the city of New York, merchant,* were the only owners. At this time, Maitland was domiciled in Great Britain ; and it is contended that the statement, that Maitland was of New York, was untrue, and subjected the vessel to forfeiture, under the act of congress of the 31st of December, 1792 ; and that although no claim is interposed for the United States, still the forfeiture produced by the misconduct of Lenox, is sufficient to turn him out of Court, whatever disposition may ultimately be made of the property. The rule of the prize Court is correctly stated in this argument ; and the only question is, whether a forfeiture did accrue to the United States. The act of congress directs that the owner who takes the oath, in case there are more than one owner, shall, in his oath, specify the names and places of abode of such owners, and that they are citizens of the United States, if such be the fact ; and if one or more of them reside abroad, as a partner or partners in a co-partnership consisting of citizens, and carrying on trade with the United States, that such is the case. The law then proceeds to declare, that if any of the matters of fact in the said oath alleged, within the knowledge of the party swearing, shall not be true, the ship shall be forfeited to the United States. It cannot be denied that, at the time this oath was taken, W. Maitland was a resident merchant of Great Britain, carrying on trade with the United States ; a fact totally inconsistent with that alleged in the oath, that he was of the city of New York. It is probable,

and the Court is willing to believe, that this statement was innocently made, under a misconception of the real character which the foreign domicil of Maitland had impressed upon him. But still, the law required explicitness on this point, and marked the distinction between a person residing abroad, and one residing within the United States. It must be
p. 277 admitted, in point of law, | that the fact sworn to by Lenox was not true; and the consequence is a forfeiture of the ship to the United States. The claim, therefore, of Lenox and Maitland to this vessel must be rejected. What order shall be made as to the ultimate disposition of the property, must depend upon the opinion which this Court may give in some other cases touching this subject.

The great question involved in this, and many other of the prize cases which have been argued, is, whether the property of these Claimants who were settled in Great Britain, and engaged in the commerce of that country, shipped before they had a knowledge of the war, but which was captured, after the declaration of war, by an American cruizer, ought to be condemned as lawful prize. It is contended by the captors, that as these Claimants had gained a domicil in Great Britain, and continued to enjoy it up to the time when war was declared, and when these captures were made, they must be considered as British subjects, in reference to this property, and, consequently, that it may legally be seized as prize of war, in like manner as if it had belonged to real British subjects. But if not so, it is then insisted, that these Claimants having, after their naturalization in the United States, returned to Great Britain, the country of their birth, and there re-settled themselves, they became redintegrated British subjects, and ought to be considered by this Court in the same light as if they had never emigrated. On the other side it is argued, that American citizens settled in the country of the enemy, as these persons were, at the time war was declared, were entitled to a reasonable time to elect, after they knew of the war, to remain there, or to return to the United States; and that, until such election was, *bona fide*, made, the Courts of this country are bound to consider them as American citizens, and their property shipped before they had an opportunity to make this election, as being protected against American capture.

There being no dispute as to the facts upon which the domicil of these Claimants is asserted, the questions of law alone remain to be considered. They are two.—First, By what means and to what extent, a
p. 278 national character may be impressed upon a person, | different from that which permanent allegiance gives him? and secondly, What are the legal consequences to which this acquired character may expose him, in the event of a war taking place between the country of his residence and that of his birth, or in which he had been naturalized?

1. The writers upon the law of nations distinguish between a tem-

porary residence in a foreign country, for a special purpose, and a residence accompanied with an intention to make it a permanent place of abode. The latter is styled by Vattel, *domicil*, which he defines to be, 'a habitation fixed in any place, with an intention of always staying there.' Such a person, says this author, becomes a member of the new society, at least as a permanent inhabitant, and is a kind of citizen of an inferior order from the native citizens; but is, nevertheless, united and subject to the society, without participating in all its advantages. This right of domicil, he continues, is not established, unless the person makes sufficiently known his intention of fixing there, either tacitly, or by an express declaration. *Vatt. p.* 92, 93—Grotius no where uses the word domicil, but he also distinguishes between those who stay in a foreign country by the necessity of their affairs, or from any other temporary cause, and those who reside there from a permanent cause. The former he denominates *strangers*, and the latter, *subjects*; and it will presently be seen, by a reference to the same author, what different consequences these two characters draw after them.

The doctrine of the prize Courts, as well as of the Courts of common law, in England, which, it was hinted, if not asserted, in argument, had no authority of universal law to stand upon, is the same with what is stated by the above writers; except that it is less general, and confines the consequences resulting from this acquired character to the property of those persons engaged in the commerce of the country in which they reside.

It is decided by those Courts, that whilst an Englishman, or a neutral, resides in a hostile country, he is a subject of that country, and is to be considered, (even | by his own or native country, in the former case) as p. 279
having a hostile character impressed upon him.

In deciding whether a person has obtained the right of an acquired domicil, it is not to be expected that much, if any, assistance should be derived from mere elementary writers on the law of nations. They can only lay down the general principles of law; and it becomes the duty of Courts to establish rules for the proper application of those principles. The question, whether the person to be affected by the right of domicil had sufficiently made known his intention of fixing himself permanently in the foreign country, must depend upon all the circumstances of the case. If he had made no express declaration on the subject, and his secret intention is to be discovered, his acts must be attended to, as affording the most satisfactory evidence of his intention. On this ground it is, that the Courts of England have decided, that a person who removes to a foreign country, settles himself there, and engages in the trade of the country, furnishes, by these acts, such evidence of an intention permanently to reside there, as to stamp him with the national character

of the state where he resides. In questions on this subject, the chief point to be considered, is the *animus manendi;* and Courts are to devise such reasonable rules of evidence as may establish the fact of intention. If it sufficiently appear that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicil is acquired by a residence even of a few days. This is one of the rules of the British Courts, and it appears to be perfectly reasonable. Another is, that a neutral or subject, found residing in a foreign country is presumed to be there *animo manendi;* and if a state of war should bring his national character into question, it lies upon him to explain the circumstances of his residence—*The Bernon,* 1, *Rob.* 86, 102. As to some other rules of the prize Courts of England, particularly those which fix a national character upon a person on the ground of constructive residence, or the peculiar nature of his trade, the Court is not called upon to give an opinion at this time: because, in this case, it is admitted that
p. 280 the Claimants had acquired a right of domicil in Great | Britain, at the time of the breaking out of the war between that country and the United States.

2. The next question is, what are the consequences to which this acquired domicil may legally expose the person entitled to it, in the event of a war taking place between the government under which he resides and that to which he owes a permanent allegiance? A neutral in his situation, if he should engage in open hostilities with the other belligerent, would be considered and treated as an enemy. A citizen of the other belligerent could not be so considered, because he could not, by any act of hostility, render himself, strictly speaking, an enemy, contrary to his permanent allegiance. But although he cannot be considered an enemy, in the strict sense of the word, yet he is deemed such, with reference to the seizure of so much of his property concerned in the trade of the enemy, as is connected with his residence. It is found adhering to the enemy. He is himself adhering to the enemy, although not criminally so, unless he engages in acts of hostility against his native country, or, probably, refuses, when required by his country, to return. The same rule, as to property engaged in the commerce of the enemy, applies to neutrals; and for the same reason. The converse of this rule inevitably applies to the subject of a belligerent state domiciled in a neutral country; he is deemed a neutral by both belligerents, with reference to the trade which he carries on with the adverse belligerent, and with all the rest of the world.

But this national character which a man acquires by residence, may be thrown off at pleasure, by a return to his native country, or even by turning his back on the country in which he has resided, on his way to another. To use the language of *sir W. Scott,* it is an adventitious

character gained by residence, and which ceases by non-residence. It no longer adheres to the party from the moment he puts himself in motion, *bona fide*, to quit the country *sine animo revertendi*. 3 *Rob.* 17, 12. *The Indian Chief.* The reasonableness of this rule can hardly be disputed. Having once acquired a national character by residence in a foreign country, he ought to be bound by all the consequences of it, until he has thrown it off, either by an actual return to his | native country, p. 281
or to that where he was naturalized, or by commencing his removal, *bona fide*, and without an intention of returning. If any thing short of actual removal be admitted to work a change in the national character acquired by residence, it seems perfectly reasonable that the evidence of a *bona fide* intention to remove should be such as to leave no doubt of its sincerity. Mere declarations of such an intention ought never to be relied upon, when contradicted, or at least rendered doubtful, by a continuance of that residence which impressed the character. They may have been made to deceive ; or, if sincerely made, they may never be executed. Even the party himself ought not to be bound by them, because he may afterwards find reason to change his determination, and ought to be permitted to do so. But when he accompanies those declarations by acts which speak a language not to be mistaken, and can hardly fail to be consummated by actual removal, the strongest evidence is afforded which the nature of such a case can furnish. And is it not proper that the Courts of a belligerent nation should deny to any person the right to use a character so equivocal, as to put it in his power to claim which ever may best suit his purpose, when it is called in question ? If his property be taken trading with the enemy, shall he be allowed to shield it from confiscation, by alleging that he had intended to remove from the country of the enemy to his own, then neutral, and, therefore, that, as a neutral, the trade was lawful ? If war exist between the country of his residence and his native country, and his property be seized by the former, or by the latter, shall he be heard to say in the former case, that he was a domiciled subject of the country of the captor, and in the latter, that he was a native subject of the country of that captor also, because he had declared an intention to resume his native character ; and thus to parry the belligerent rights of both ? It is to guard against such inconsistencies, and against the frauds which such pretensions, if tolerated, would sanction, that the rule above mentioned has been adopted. Upon what sound principle can a distinction be framed between the case of a neutral, and the subject of one belligerent domiciled in the country of the other at the breaking out of the war ? The property of each, found engaged in the commerce of their adopted country, belonged to them, | before the war, in their character of subjects p. 282
of that country, so long as they continued to retain their domicil ; and

when a state of war takes place between that country and any other, by which the two nations and all their subjects become enemies to each other, it follows that the property, which was once the property of a friend, belongs now, in reference to that property, to an enemy. This doctrine of the common law and prize Courts of England is founded, like that mentioned under the first head, upon national law; and it is believed to be strongly supported by reason and justice. It is laid down by *Grotius, p.* 563, 'that all the subjects of the enemy who are 'such from a permanent cause, that is to say, settled in the country, 'are liable to the law of reprisals, whether they be natives or foreigners; 'but not so if they are only trading or sojourning for a little time.' And why, it may be confidently asked, should not the property of such subjects be exposed to the law of reprisals and of war, so long as the owner retains his acquired domicil, or, in the words of *Grotius*, continues a permanent residence in the country of the enemy? They were before, and continue after the war, bound, by such residence, to the society of which they are members, subject to the laws of the state, and owing a qualified allegiance thereto; they are obliged to defend it, (with an exception in favor of such a subject, in relation to his native country) in return for the protection it affords them, and the privileges which the laws bestow upon them as subjects. The property of such persons, equally with that of the native subjects in their totality, is to be considered as the goods of the nation, *in regard to other states*. It belongs, in some sort, to the state, from the right which she has over the goods of its citizens, which make a part of the sum total of its riches, and augment its power. *Vatt.* 147, and also *B.* 1, *c.* 14, § 182. In reprisals, continues the same author, we seize on the property of the subject, just as we would that of the sovereign; every thing that belongs to the nation is subject to reprisals, wherever it can be seized, with the exception of a deposit entrusted to the public faith. *B.* 2, *c.* 18, § 344. Now if a permanent residence constitutes the person a subject of the country where he is settled, so long as he continues to reside there, and subjects his property to the law of reprisals, as a part of the property of the
p. 283 | nation, it would seem difficult to maintain that the same consequences would not follow in the case of an open and public war, whether between the adopted and native countries of persons so domiciled, or between the former and any other nation. If, then, nothing but an actual removal, or a *bona fide* beginning to remove, can change a national character acquired by domicil, and if, at the time of the inception of the voyage, as well as at the time of capture, the property belonged to such domiciled person in his character of a subject, what is there that does, or ought to exempt it from capture by the privateers of his native country, if, at the time of capture, he continues to reside in the country of the adverse

belligerent ? It is contended that a native or naturalized subject of one country, who is surprised in the country where he was domiciled by a declaration of war, ought to have time to make his election to continue there, or to remove to the country to which he owes a permanent allegiance ; and that, until such election is made, his property ought to be protected from capture by the cruizers of the latter. This doctrine is believed to be as unfounded in reason and justice, as it clearly is in law. In the first place, it is founded upon a presumption that the person will certainly remove, before it can possibly be known whether he may elect to do so or not. It is said that this presumption ought to be made, because, upon receiving information of the war, it will be his duty to return home. This position is denied. It is his duty to commit no acts of hostility against his native country, and to return to her assistance when required to do so ; nor will any just nation, regarding the mild principles of the law of nations, require him to take arms against his native country, or refuse her permission to him to withdraw whenever he wishes to do so, unless under peculiar circumstances, which, by such removal at a critical period, might endanger the public safety. The conventional law of nations is in conformity with these principles. It is not uncommon to stipulate in treaties that the subjects of each shall be allowed to remove with their property, or to remain unmolested. Such a stipulation does not coerce those subjects either to remove or to remain. They are left free to chuse for themselves ; and when they have made their election, they claim the right of enjoying | it under the p. 284
treaty. But until the election is made, their former character continues unchanged.

Until this election is made, if his property found upon the high seas, engaged in the commerce of his adopted country, should be permitted, by the cruizers of the other belligerent, to pass free, under the notion that he may elect to remove, upon notice of the war, and should arrive safe, what is to be done in case the owner of it should afterwards elect to remain where he is ? or, if captured and brought immediately to adjudication, it must, upon this doctrine, be acquitted until the election to remain is made and known. In short, the point contended for would apply the doctrine of relation to cases where the party claiming the benefit of it may gain all, and can lose nothing. If he, after the capture, should find it his interest to remain where he is domiciled, his property embarked before his election was made, is safe ; and if he finds it best to return, it is safe of course. It is safe whether he goes or stays. This doctrine, producing such contradictory consequences, is not only unsupported by any authority, but it would violate principles long and well established in the prize Courts of England, and which ought not, without strong reasons which may render them inapplicable to this country,

to be disregarded by this Court. The rule there, is, that the character of property, during war, cannot be changed *in transitu*, by any act of the party, subsequent to the capture. The rule indeed goes farther: as to the correctness of which in its greatest extension, no opinion need now be given; but it may safely be affirmed that this change cannot and ought not to be effected by an election of the owner and shipper of it made *subsequent to the capture*, and, more especially, after a knowledge of the capture is obtained by the owner. Observe the consequences which would result from it. The capture is made and known. The owner is allowed to deliberate whether it is his interest to remain a subject of his adopted, or of his native country. If the capture be made by the former, then he elects to be a subject of that country; if by the latter, then a subject of that. Can such a privileged situation be tolerated by either belligerent? Can any system of law be correct, which places an individual who adheres to one belligerent, and, to the period of his
p. 285 election to remove, contributes to encrease her wealth, in so anomalous a situation as to be clothed with the privileges of a neutral, as to both belligerents? This notion about a temporary state of neutrality impressed upon a subject of one of the belligerents, and the consequent exemption of his property from capture by either, until he has had notice of the war and made his election, is altogether a novel theory, and seems, from the course of the argument, to owe its origin to a supposed hardship to which the contrary doctrine exposes him. But if the reasoning employed on this subject be correct, no such hardship can exist. For if, before the election is made, his property on the ocean is liable to capture by the cruizers of his native and deserted country, it is not only free from capture by those of his adopted country, but is under its protection. The privilege is supposed to be equal to the disadvantage, and is therefore just. The double privilege claimed seems too unreasonable to be granted.

It will be observed, that in the foregoing opinion respecting the nature and consequences of domicil, very few cases have been referred to. It was thought best not to interrupt the chain of argument, by stopping to examine cases; but faithfully to present the essential principles to be extracted from those which were cited at the bar, or which have otherwise come under the view of the Court, and which applied to the subject. With what success this has been executed, is not for me to decide. But there are two or three cases which seem to be so applicable, and at the same time so conclusive on the great points of this question, that it may not be improper briefly to notice them. In support of the general principles, that the national character of the owner at the time of capture, must decide his right to claim, and that a subject is condemned by it, even in the Courts of his native country, without time

being allowed to him to elect to remove, the following cases may be referred to. In the *Boedes Lust*, 5 *Rob.* 247, it was decided that the property of a resident of Demarara, shipped before hostilities of any kind had occurred between Holland and Great Britain, but which was captured under an embargo declared by England upon Dutch property, as preparatory to war which ensued soon after the seizure, was, by the retroactive effect of the war applied to property so seized, to be considered | as the property of an enemy taken in war. In this case, *sir W.* p. 286
Scott lays it down, that, where property is taken in a state of hostility, the universal practice has ever been to hold it subject to condemnation, although the Claimants may have become friends and subjects prior to the adjudication. This case is somewhat stronger than the present, in the circumstance that in that, the state of hostility, alleged to have existed at the time of capture was made out by considering the subsequent declaration of war as relating back to the time of seizure under the embargo, by which reference it was decided to be a hostile embargo, and of course tantamount to an actual state of war. But this case also proves, not only that the hostile character of the property at the time of capture establishes the legality of it, but that no future circumstance changing the hostile character of the Claimant to that of a friend or subject, can entitle him to restitution. Whether the Claimant, in this case, was a neutral or a British subject, does not appear. But if the former, it will not, it is presumed, be contended that he is, upon the principles of national law, less to be favored in the Courts of the belligerent, than a subject of that nation domiciled in the country of the adverse belligerent. *Whitehill's* case, however, referred to frequently in *Rob. reports*, comes fully up to the present, because he was a British subject, who had settled but a few days in the hostile country, but before he knew or could have known of the declaration of war; yet, as he went there with an intention to settle, this, connected with his residence, short as it was, fixed his national character, and identified him with the enemy of the country he had so recently quitted. The want of notice, and of an opportunity to extricate himself from a situation to which he had so recently and so innocently exposed himself, could not prevail to protect his property against the belligerent rights of his own country, and to save it from confiscation. There are many other strong cases upon these points, which I forbear to notice particularly, from an unwillingness to swell this opinion already too long.

The sentence of the Court is as follows:

This cause came on to be heard on the transcript of the record, and was argued by counsel; on consideration whereof, it is decreed and ordered that the sentence of | the Circuit Court of Massachusetts condemn- p. 287
ing the one hundred casks of white lead claimed by Lenox and Maitland

be, and the same is hereby affirmed with costs. And that the sentence of the said Circuit Court as to the claim of Magee and Jones to twenty-one trunks of merchandize be, and the same is hereby reversed and annulled; and that the said twenty-one trunks of merchandize be condemned to the captors; and that the sentence of the said Circuit Court as to the ship Venus claimed by Lenox and Maitland be and the same is hereby reversed; and that the said ship Venus be condemned, the one half thereof to the captors, the other half to the United States, under the order of the said Circuit Court. That the sentence of the said Circuit Court as to the claim of Wm. Maitland to one half of one hundred and fifty crates of earthen ware, thirty-five cases and three casks of copper, nine pieces of cotton bagging and twenty and four twentieths tons of coal, be and the same is hereby reversed, and that the same be condemned to the captors; and that the sentence of the said Circuit Court, as to the claim of Alexander M'Gregor to one half of one hundred and ninety-eight packages of merchandize as the joint property of himself and Lenox and Maitland, and of the claim of Wm. Maitland for one fourth of the same goods, and of the claim of Alexander M'Gregor to twenty-five pieces of cotton bagging and five trunks of merchandize, be, and the same is hereby reversed and annulled, and that the same be condemned to the captors; and that the said cause be remanded to the said Circuit Court for further proceedings to be had therein.

JOHNSON, *J.* declined giving an opinion.

STORY, *J.* I do not sit in this cause: but the great question involved in it, respecting the effect of domicil on national character, forms the leading point in many cases before the Court. Those cases have been ably and fully argued, and I have listened, with great solicitude and attention, to the discussion. On so important a question, where a difference of opinion has been expressed on the bench, I do not feel at liberty to withdraw myself from the responsibility which the law imposes on me. The parties in the other cases have a right to my opinion; and,
p. 288 however painful it is, in the embarrassing | situation in which I stand, to declare it, I shall not shrink from what I deem a peremptory duty. The question is not new to me: It has been repeatedly before me in the Circuit Court, and has been applied sometimes to relieve and sometimes to condemn the Claimant. I shall not pretend to go over the grounds of argument; but content myself with declaring my entire concurrence in the opinion expressed by Judge Washington on this point.

MARSHALL, *Ch. J.* I entirely concur in so much of the opinion delivered in this case, as attaches a hostile character to the property of an American citizen continuing, after the declaration of war, to reside and trade in the country of the enemy; and I subscribe implicitly to the reasoning urged in its support. But from so much of that opinion

as subjects to confiscation the property of a citizen shipped before a knowledge of the war, and which disallows the defence founded on an intention to change his domicil and to return to the United States, manifested in a sufficient manner, and within a reasonable time after knowledge of the war, although it be subsequent to the capture, I feel myself compelled to dissent.

The question is undoubtedly complex and intricate. It is difficult to draw a line of discrimination which shall be at the same time precise and equitable. But the difficulty does not appear to me to be sufficient to deter Courts from making the attempt.

A merchant residing abroad for commercial purposes may certainly intend to continue in the foreign country so long as peace shall exist, provided his commercial objects shall detain him so long, but to leave it the instant war shall break out between that country and his own. This intention, it is not necessary to manifest during peace; and when war shall commence, the belligerent cruizer may find his property on the ocean, and may capture it, before he knows that war exists. The question whether this be enemy property or not, depends, in my judgment, not exclusively on the residence of the owner at the time, but on his residence taken in connexion with his national character as a citizen, and with his intention to continue or to discontinue his commercial domicil in the event of war. |

The evidence of this intention will rarely, if ever, be given during p. 289
peace. It must, therefore, be furnished, if at all, after the war shall be known to him; and that knowledge may be preceded by the capture of his goods. It appears to me, then, to be a case in which, as in many others, justice requires that subsequent testimony shall be received to prove a pre-existing fact. Measures taken for removal immediately after a war, may prove a previous intention to remove in the event of war, and may prove that the captured property, although, *prima facie*, belonging to an enemy, does, in fact, belong to a friend. In such case, the citizen, in my opinion, has a right, in the nature of the *jus postliminii*, to claim restitution.

As this question is not only decisive of many claims now depending before this Court, but is also of vast importance to our merchants generally, I may be excused for stating, at some length, the reasons on which my opinion is founded.

The whole system of decisions applicable to this subject, rests on the law of nations as its base. It is, therefore, of some importance to enquire how far the writers on that law consider the subjects of one power residing within the territory of another, as retaining their original character, or partaking of the character of the nation in which they reside.

Vattel, who, though not very full to this point, is more explicit and more satisfactory on it than any other whose work has fallen into my

hands, says, 'the citizens are the members of the civil society; bound 'to this society by certain duties, and subject to its authority, they 'equally participate in its advantages. The *natives*, or *indigenes*, are 'those born in the country, of parents who are citizens. Society not 'being able to subsist and to perpetuate itself but by the children of the 'citizens, those children naturally follow the condition of their fathers, 'and succeed to all their rights.'

'The inhabitants, as distinguished from citizens, are strangers who 'are permitted to settle and stay in the country. Bound by their resi-'dence to the society, they are subject to the laws of the state, while they
p. 290 'reside there, and they are obliged to defend it, because it grants | them 'protection, though they do not participate in all the rights of citizens. 'They enjoy only the advantages which the laws, or custom gives them. 'The *perpetual inhabitants* are those who have received the right of 'perpetual residence. These are a kind of citizens of an inferior order, 'and are united and subject to the society, without participating in all 'its advantages.'

'The domicil is the habitation fixed in any place, with an intention 'of always staying there. A man does not, then, establish his domicil in 'any place, unless he makes sufficiently known his intention of fixing 'there, either tacitly or by an express declaration. However, this 'declaration is no reason why, if he afterwards changes his mind, he may 'not remove his domicil elsewhere. In this sense, he who stops, even for 'a long time, in a place, for the management of his affairs, has only 'a simple habitation there, but has no domicil.'

A domicil, then, in the sense in which this term is used by *Vattel*, requires not only actual residence in a foreign country, but 'an intention of always staying there.' Actual residence without this intention, amounts to no more than 'simple habitation.'

Although this intention may be implied without being expressed, it ought not, I think, to be implied, to the injury of the individual, from acts entirely equivocal. If the stranger has not the power of making his residence perpetual, if circumstances, after his arrival in a country, so change, as to make his continuance there disadvantageous to himself, and his power to continue, doubtful; 'an intention always to stay there' ought not, I think, to be fixed upon him, in consequence of an unexplained residence previous to that change of circumstances. Mere residence, under particular circumstances, would seem to me, at most, to prove only an intention to remain so long as those circumstances continue the same, or equally advantageous. This does not give a domicil. The intention which gives a domicil is an unconditional intention 'to stay always.'

The right of the citizens or subjects of one country to remain in
p. 291 another, depends on the will of the sovereign | of that other; and if that

will be not expressed otherwise than by that general hospitality which receives and affords security to strangers, it is supposed to terminate with the relations of peace between the two countries. When war breaks out, the subjects of one belligerent in the country of the other are considered as enemies, and have no right to remain there.

Vattel says, 'enemies continue such wherever they happen to be. 'The place of abode is of no account here. It is the political ties which 'determine the quality. While a man remains a citizen of his own 'country, he remains the enemy of all those with whom his nation is 'at war.'

It would seem to me, to require very strong evidence of an intention to become the permanent inhabitant of a foreign country, to justify a court in presuming such intention to continue, when that residence must expose the person to the inconvenience of being considered and treated as an enemy. The intention to be inferred solely from the fact of residence during peace, for commercial purposes, is, in my judgment, necessarily conditional, and dependent on the continuance of the relations of peace between the two countries.

So far is the law of nations from considering residence in a foreign country in time of peace, as evidence of an intention 'always to stay 'there,' even in time of war, that the very contrary is expressed. *Vattel* says, 'the sovereign declaring war can neither detain those subjects of 'the enemy who are within his dominions at the time of the declaration, 'nor their effects. They came into his country on the public faith. By 'permitting them to enter his territory and to continue there, he tacitly 'promised them liberty and security for their return. He is therefore to 'allow them a reasonable time for withdrawing with their effects; and 'if they stay beyond the time prescribed, he has a right to treat them as 'enemies, though as enemies disarmed.'

The stranger merely residing in a country during peace, however long his stay, and whatever his employment, provided it be such as strangers may engage in, cannot, on the principles of national law, be considered | as incorporated into that society, so as, immediately on a declaration of p. 292 war, to become the enemy of his own. 'His property,' says *Vattel*, 'is still a part of the totality of the wealth of his nation.' 'The citizen or 'subject of a state, who absents himself for a time, without any intention 'to abandon the society of which he is a member, does not lose his 'privilege by his absence; he preserves his rights, and remains bound by 'the same obligations. Being received in a foreign country, in virtue of 'the natural society, the communication and commerce, which nations 'are obliged to cultivate with each other, he ought to be considered there 'as a member of his own nation, and treated as such.'

The subject of one power inhabiting the country of another, ought

not to be considered as a member of the nation in which he resides, even by foreigners ; nor ought he, on the first commencement of hostilities, to be treated as an enemy by the enemies of that nation.

Burlamaqui says, ' as to strangers, those who settle in the enemy's ' country after a war is begun, of which they had previous notice, may ' justly be looked upon as enemies and treated as such. But in regard ' to such as went thither before the war, justice and humanity require ' that we should give them a reasonable time to retire ; and if they neglect ' that opportunity, they are accounted enemies.'

If this rule be obligatory on foreign nations, much more ought it to bind that of which the individual is a member.

I think I cannot be mistaken, when I say that, in all the views taken of this subject by the most approved writers on the law of nations, the citizen of one country residing in another, is not considered as incorporated in that other, but is still considered as belonging to that society of which he was originally a member. And if war break out between the two nations, he is to be permitted, and is expected, to return to his own. I do not perceive in those writers any exception with regard to merchants.

p. 293 It must, however, be acknowledged that the great extension | of commerce has had considerable influence on national law. Rules have been adopted, perhaps by general consent, principles have been engrafted on the original stalk of public law, by which merchants, while belonging politically to one society, are considered commercially as the members of another. For commercial purposes the merchant is considered as a member of that society in which he has his domicil ; and less conclusive evidence than would seem to be required in general cases, by the law of nations, has been allowed to fix the domicil for commercial purposes. But I cannot admit that the original meaning of the term is to be entirely disregarded, or the true nature of this domicil to be overlooked. The effects of the rule ought to be regulated by the motives which are presumed to have induced its establishment, and by the convenience it was intended to promote.

The policy of commercial nations receives foreign merchants into their bosom ; and permits their own citizens to reside abroad for the purposes of trade without injury to their rights or character as citizens. This free intercommunication must certainly be believed, by the nations who allow it, to be promotive of their interests. Nor is this opinion ill founded. Nothing can be more obvious than that the affairs of a commercial company will be transacted to most advantage by being conducted, as it respects both purchase and sale, under the eye of a person interested in the result. The nation which takes an interest in the prosperity of its commerce, can feel no inclination to restrain its citizens from residence abroad for the purposes of commerce ; nor will it hastily construe such residence into a change of national character, to the injury of

the individual. It is not the policy of such a nation, nor can it be its wish, to restrain its citizens from pursuing abroad a business which tends to enrich itself. It ought not, then, to consider them as enemies in consequence of their having engaged in such pursuit in the country of a friend, who, before their removal, becomes an enemy.

If, indeed, it be the real intention of the citizen permanently to change his national character, if it be his choice to remain in the country of the enemy during | war, there can be no harshness—no injustice in treating p. 294
him as an enemy. But if, while prosecuting his business in a foreign country, he contemplates a return to his own ; if, in the prosecution of that business, he is promoting rather than counteracting the interests and policy of the country of which he is a member, it would seem to me to be pressing the principle too far, and to be drawing conclusions which the premises will not warrant, to infer, conclusively, an intention to continue in a country which has become hostile, from a residence and trading in that country while it was friendly ; and to punish him by the confiscation of his goods, as if he was fully convicted of that intention.

It is admitted to be a general rule, that, while the state of things remains unaltered, while the motives which carried the citizen abroad continue, while he still prosecutes a business of uncertain duration, his capacity to prosecute which is not impaired, his mercantile character is confounded with that of the country in which he resides, and his trade is considered as the trade of that country.

It will require but a slight examination of the subject to perceive the reason of this rule ; and that, to a certain extent, it is convenient without being unjust.

In times of universal peace, the question of national character can arise only when some privilege or some disability is attached to it, or in cases of insurance. A particular trade may be allowed or be prohibited to the merchants of a particular nation, or property may be warranted to be of a particular nation. If, in such cases, the residence of the individual be received as evidence of his national mercantile character, the subjects of enquiry are simplified, the questions are reduced to a plain one, and the various complex enquiries, which might otherwise arise, are avoided. There is, therefore, much convenience in adopting this principle in such a state of things ; and it is not perceived that any injustice can grow out of it ; since the individual to whom the rule is applied is not surprised by any new or unlooked for event.

So if war exists between two nations. Each belligerent | having p. 295
a right to capture the property of the other found on the ocean, each being intent on destroying the commerce of the other, and on depriving it of every cover under which it may seek to shelter itself, will certainly not allow the advantages of neutrality to a merchant residing in the

country of his enemy. Were this permitted, the whole trade of the enemy could assume, and would assume, a neutral garb.

There is, in general, no reason for supposing that a merchant residing in a foreign country, and carrying on trade, means to withdraw from it, on its engaging in war with any other country to which he is bound by no obligation. By continuing, during war, the domicil acquired in peace, he violates no duty, offends against no generally acknowledged principle, and retains all his rights of residence and commerce. The war, then, furnishes no motive for presuming that he is about to change his situation, and to resume his original national character.

These reasons appear to me to require the rule as a general one, and to justify its application to general cases. But they do not, in my opinion, justify its application to the case of a merchant whom war finds engaged in trade in a country which becomes the enemy of his own. His country ought not, I think, to bind him by his residence during peace; nor to consider him as precluded by it from showing an intention that it should terminate with the relations of peace.

When it is considered that his right to remain and prosecute that trade in which he had been engaged during peace, is forfeited; that his duty, and most probably his inclinations, call him home; that he has become the enemy of the country in which he resides; that his continuance in it exposes him to many and serious inconveniences; that his person and property are in danger; it is not, I think, going too far to say that this change in his situation may be considered as changing his intention on the subject of residence, and as affording a presumption of intending to return.

Let it be remembered that, according to the law of nations, domicil
p. 296 depends on the intention to reside | permanently in the country to which the individual has removed; and that a change of this intention is, at any time, allowable. If, upon grounds of general policy and general convenience, while the circumstances under which the residence commenced, continue the same, residence and employment in permanent trade be considered as evidence of an intention to continue permanently in the country, and as giving a commercial national character, may not a total change in circumstances—a loss of the capacity to carry on the trade, be received, in the absence of all conflicting proof, as presumptive evidence of an intention to leave the country, and as extricating the trade, carried on in the time of supposed peace, from the national character, so far as to protect it from the perils of war? At any rate, do not reason and justice require that this change of circumstances should leave the question open to be decided on such other evidence as the war must produce?

The great object for which an American merchant fixes himself in a foreign country, is, most generally, to carry on trade between that country and his own. In almost every case of this description before the

Court, the Claimant is a member of a house established in the United States ; and his business abroad is subservient to the business at home. This trade is annihilated by the war.

If, while peace subsists between the United States and Great Britain, while the American merchant possesses there all the commercial rights allowed to the citizens of a friendly nation, and may carry on uninterruptedly his trade to his own country, he is presumed, his intentions being unexplained, to intend remaining there always, and may, for general convenience, be clothed with the commercial character of the nation in which he resides, ought this presumption to be extended, by his own government, beyond the facts out of which it grows, if the interest of the individual be materially affected by that extension ? Do not reason and justice require that we should consider his original intention as being only co-extensive with the causes which carried him to and detained him in the country, as being, in its nature, conditional, and dependent on the continuance of those causes ? |

If such a person were required, on his arrival in a foreign country, p. 297
to declare his real intentions on the subject of residence, he would, most probably, say, if he spoke honestly, ' I come for the purpose of trade : I shall remain while the situation of the two countries permits me to carry on my trade lawfully, securely, and advantageously : when that situation so changes as to deprive me of these rights, I shall return.' His intention, then, to reside in the country, his domicil in it, and, consequently, his commercial character, unless he continued his trade after war, would be clearly limited by the duration of peace. It would not, I think, be unreasonable to say that the intention, to be implied from his conduct, ought to have the same limitation.

To me it seems that a mere commercial domicil acquired in time of peace, necessarily expires at the commencement of hostilities. Domicil supposes rights incompatible with a state of war. If the foreign merchant be not compelled to abandon the country, it is not because his commercial character confers on him a legal right to stay, but because he is specially permitted to stay. If in this I am correct, it would seem to follow, that, if all the legal consequences of a residence in time of peace do not absolutely terminate with the peace, yet the national commercial character which that residence has attached to the individual, is not so conclusively fixed upon him as to disqualify him from showing that, within a reasonable time after the commencement of hostilities, he made arrangements for returning to his own country. If a residence and trading after the war be not indispensably necessary to give the citizen merchant or his property a hostile character, yet removal, or measures showing a determination to remove, within a reasonable time after the war, may retroact upon property shipped before a knowledge

of the war, and rescue that property from the hostile character attached to the property of the nation in which the individual resided.

The law of nations is a law founded on the great and immutable principles of equity and natural justice. To draw an inference against all probability, whereby a citizen, for the purpose of confiscating his goods, is clothed, against his inclination, with the character of an enemy,
p. 298 in consequence of an act which, when committed, | was innocent in itself, was entirely compatible with his political character as a citizen, and with the political views of his government, would seem to me to subvert those principles. The rule which, for obvious reasons, applies to the merchant in time of peace or in time of war, the national commercial character of the country in which he resides, cannot, in my opinion, without subverting those principles, apply a hostile character to his trade carried on during peace, so conclusively as to prevent his protecting it by changing that character within a reasonable time after a knowledge of the war.

My opinion, then, is, that a mere commercial domicil acquired by an American citizen in time of peace, especially if he be a member of an American house, and is carrying on trade auxiliary to his trade with his own country, ought not to be considered positively as continuing longer than the state of peace. The declaration of war is a fact which removes the causes that induced his residence in the foreign country. They no longer operate upon him. When they cease, their effects ought to cease. An intention which they produced, ought not to be supposed to continue. The character of his property shipped before a knowledge of the war, ought not to be decided absolutely by his residence at the time of shipment or capture, but ought to depend on his continuing to reside and trade in the enemy country, or on his taking prompt measures for returning to his own.

This is the conclusion to which my mind would certainly be conducted, might I permit it to be guided by the lights of reason and the principles of natural justice. But it is said that a course of adjudications has settled the law to be otherwise—that we cannot, without overturning a magnificent system bottomed on the broad base of national law, and of which the parts are admirably adjusted to each other, yield to the dictates of humanity on this particular question. *Sir William Scott*, it is argued at the bar, has, by a series of decisions, developed the principles of national law on this subject, with a perspicuity and precision which mark plainly the path we ought to tread. |
p. 299 I respect *sir William Scott*, as I do every truely great man; and I respect his decisions; nor should I depart from them on light grounds: but it is impossible to consider them attentively, without perceiving that his mind leans strongly in favor of the captors. Residence, for

example, in a belligerent country, will condemn the share of a neutral in a house, trading in a neutral country; but residence in a neutral country will not protect the share of a belligerent or neutral in a commercial house established in a belligerent country. In a great maritime country, depending on its navy for its glory and its safety, the national bias is perhaps so entirely in this direction, that the judge, without being conscious of the fact, must feel its influence. However this may be, it is a fact of which I am fully convinced; and, on this account, it appears to me to be the more proper to investigate rigidly the principles on which his decisions have been made, and not to extend them where such extension may produce injustice.

While I make this observation, it would betray a want of candor not to accompany it with the acknowledgement that I perceive in the opinions of this eminent judge, no disposition to press this principle with peculiar severity against neutrals. He has certainly not mitigated it when applying it to British subjects.

With this impression respecting the general character of British admiralty decisions, I proceed to examine them so far as they bear on the question of domicil.

The case of the *Vigilantia* does not itself involve the point. But in delivering his opinion, the judge cited two cases of capture which have been quoted and relied on at bar. In each of these, the share of the partner residing in the neutral country, was restored, and that of the partner residing in the belligerent country was condemned. But these decisions applied to a trade continued to be carried on during war.

In a subsequent case, the share of the partner residing in the neutral country also was condemned; and the lords commissioners said that the principle on which restitution was decreed in each of the first mentioned cases, was, 'that they were merely at the commencement | of a p. 300
war.' They said that 'a person carrying on trade habitually in the 'country of the enemy, though not resident there, should have time to 'withdraw himself from that commerce; that it would press too heavily 'on neutrals to say that, immediately, on the first breaking out of a 'war, their goods would become subject to confiscation.'

On these cases it is to be observed, that, although the two first happened at the commencement of the war, yet they happened during a war; and the partners whose interest was condemned, do not appear to have discontinued their residence and trading in the country of the enemy, after war had taken place. The declaration 'that it would press too heavily on neutrals to say that, immediately on the first breaking out of a war, their goods would become subject to confiscation,' though applied to a neutral not residing in the belligerent country, clearly discriminates, in a case of capture, between the rights of parties at the

commencement of a war, and at a subsequent period. But it is sufficient to say that neither the case itself, nor the cases and opinions cited in it, apply directly to the question before this Court.

In the case of the *Harmony*, the property of Mr. Murray, an American citizen residing in France, was condemned on account of that residence. But Mr. Murray had removed to France, during the war, and had continued there for four years.

The scope of the argument of *sir William Scott* goes to show that the single circumstance of residence in the enemy country, if not intended to be permanent, will not give the enemy character to the property of such resident captured in a trade between his own country and that of the enemy. It is material that the conduct of Mr. Murray, subsequent to the capture, had great influence in determining the fate of his property. Had he returned to the United States immediately after that event, I do not hazard much in saying that restitution would have been decreed.

In the case of the *Indian Chief*, Mr. Johnson, an American citizen
p. 301 domiciliated in England, had engaged | in a merchantile enterprize to the British East Indies—a trade allowed to an American citizen, but prohibited to a British subject. On its return, the vessel came into Cowes, and was seized for being concerned in illicit trade. Mr. Johnson had then left England for the United States. He was considered as not being a British subject at the time of capture, and restitution was decreed.

In delivering his opinion in this case, *sir William Scott* said, ' Taking it to be clear that the national character of Mr. Johnson, as a British merchant, was founded in residence only, that it was acquired by residence, and rested on that circumstance alone, it must be held, that, from the moment he turns his back on the country where he has resided, on his way to his own country, he was in the act of resuming his original character, and is to be considered as an American. The character that is gained by residence, ceases by non-residence. It is an adventitious character that no longer adheres to him from the moment that he puts himself in motion, *bona fide*, to quit the country *sine animo revertendi*.'

This case undoubtedly proves, affirmatively, that the national character gained by residence ceases with that residence ; but I cannot admit it to prove, negatively, that this national character can be laid down by no other means. I cannot, for instance, admit that an American citizen, who had gained a domicil in England during peace, and was desirous of returning home on the breaking out of war, but was detained by force, could, under the authority of this opinion, be treated as a British trader, with respect to his property embarked before a knowledge of the war.

In the case of *La Virginie*, the property of a Mr. Lapierre, who was probably naturalized in the United States, but who had returned to

St. Domingo, and had shipped the produce of that island to France, was condemned. But he was considered as a Frenchman, was residing at the time in a French colony, and was engaged in a trade between that colony and the mother country. The case, the judge observed, might have been otherwise decided, had the shipment been made to the U. States. |

In the case of the *Jonge Clarissa*, Mr. Ravie had a license to make p. 302
certain importations as a British subject. He had a house in Amsterdam, went there in person during the war, and made the shipment under his own inspection and control. It was determined that, in this transaction, he acted in his character as a Dutch merchant, and was not protected by his license. This was a trading during war.

In the case of the *Citto*, the property of Mr. Bowden, a British subject residing in Holland, was condemned. It appeared that he had settled in Amsterdam, where he had resided, carrying on trade, for six years. In 1795, when the French troops took possession of that country, he left it and settled in Guernsey. The *Citto* was a Danish vessel captured in April, 1796, on a voyage from a Spanish port to Guernsey, where Mr. Bowden then resided. In June, 1796, after the capture of the *Citto*, he returned to Holland. In argument, it was contended, that it appeared that British subjects might reside in Holland, without forfeiting their British character, from the proclamation of the 3d of September, 1796, which directs the landing of goods, imported under that order into the united provinces, to be certified by *British merchants resident there.*

The judge was desirous of knowing the nature of Mr. Bowden's residence in Holland—whether he had confined himself to the object of withdrawing his property, or had been engaged in the general traffic of the place. If the former, ' he may,' said the judge, ' be entitled to resti-
' tution ; more especially adverting to the order in council, which is
' certainly so worded as not to be very easy to be applied.'

The cause stood for further proof.

It is plain that, in this opinion, the residence of the Claimant at the time of capture was not considered as conclusive. Had it been so, restitution must have been decreed, because Mr. Bowden was a British subject, and, at that time, resided in Guernsey. It is equally apparent, that, had his subsequent residence in the enemy country been for the sole purpose of withdrawing his property, the law was not understood to forbid restitution. | The language of *sir William Scott* certainly ascribes p. 303
considerable influence to the proclamation, but does not rest the right of the Claimant altogether on that fact.

On the 17th of March, 1800, an affidavit of Mr. Bowden, made the 6th of August, 1799, was produced, in which he stated his residence in Holland previous to the invasion by the French. That he quitted Holland and landed in England, the 20th of January, 1795, whence he proceeded

to Guernsey, where he resided with his family. That, in the month of June, 1796, he was under the absolute necessity of returning to Holland, for the purpose of recovering debts due and effects belonging to the partnership, his partner remaining in Guernsey.

The affidavit then proceeded to state many instances of his attachment to his own government, and concluded with averring that he was still under the necessity of remaining in Holland, for the purpose of recovering part of the said debts and effects, which would be impossible were he to leave the country; but that it was his intention to return to his native country, so soon as his affairs would permit where his mother and his relations reside.

The Court observed that it appeared, from the affidavit, that Mr. Bowden was, at that time, in Holland; and added, 'it would be a strange 'act of injustice, if while we are condemning the goods of persons of all 'nations resident in Holland, we were to restore the goods of native 'British subjects resident there. An Englishman residing and trading 'in Holland, is just as much a Dutch merchant as a Swede or a Dane 'would be.'

This case was decided in 1800. Mr. Bowden had returned to Holland in 1796, during the war, and had continued in the country of the enemy. It is not denied that he continued his trade, and the fact that he did continue it is fairly to be inferred, not only from his omitting to aver the contrary, but from the language of *sir William Scott*. 'An Englishman residing and *trading* in Holland,' says that judge, 'is just as much 'a Dutch merchant as a Swede or a Dane would be.' The case of Mr. Bowden, then, is the case of a British subject who continued to reside and trade in the enemy country four years after the commencement of hos-
p. 304 tilities. His | property must have been condemned on one of two principles. Either the judge must have considered his residence in Guernsey, from January, 1795 to June, 1796, as a temporary interruption of his permanent residence in Holland, and not as a change of domicil, since he returned to that country, and continued in it, as a trader, to the rendition of the final sentence; or he must have decided that, although Mr. Bowden remained and intended to remain in fact a British subject, yet the permanent national commercial character which he acquired after this capture, retroacted on a trade which, at the time of capture was entirely British, and subjected the property to confiscation. On whichsoever of these principles the case was decided, it is clear that the hostile character attached to the property of Mr. Bowden in consequence of his residing and trading in the country of the enemy during the war. This case is, I think, materially variant from one in which the residence and trading took place during peace, and the capture was made before a change of residence could be conveniently effected.

The *Diana* is also a case of considerable interest, which contains doctrines entitled to attentive consideration.

During the war between Great Britain and Holland, which commenced in 1795, the island of Demarara surrendered to the British arms. By the treaty of Amiens, it was restored to the Dutch. That treaty contained an article allowing the inhabitants, of whatever country they might be, a term of three years, to be computed from the notification of the treaty, for the purpose of disposing of their property acquired and possessed before or during the war, in which term they may have the full exercise of their religion and enjoyment of their property.

Previous to the declaration of war against Holland, in 1803, the *Diana* and several other vessels, loaded with colonial produce, were captured on a voyage from Demarara to Holland. Immediately after the declaration of war, and before the expiration of three years from the notification of the treaty of Amiens, Demarara again surrendered to Great Britain. Claims to the captured | property were filed by original p. 305
British subjects, inhabitants of Demarara, some of whom had settled in the colony while it was in possession of Great Britain, others before that event. The trial came on after the island had again become a British colony.

Sir William Scott decreed restitution to those British subjects who had settled in the colony while in British possession, but condemned the property of those who had settled there before that time. He held, that their settling in Demarara while belonging to Great Britain, afforded a presumption of their intending to return, if the island should be transferred to a foreign power; which presumption, recognized in the treaty, relieved those Claimants from the necessity of proving such intention. He thought it highly reasonable that they should be admitted to their *jus postliminii*, and be held entitled to the protection of British subjects.

But the property of those Claimants who had settled before it came to the possession of Great Britain, was condemned. 'Having settled 'without any faith in British possession, it cannot be supposed,' he said, 'that they would have relinquished their residence, because that possession had ceased. They had passed from one sovereignty to another with 'indifference; and if they may be supposed to have looked again to 'a connexion with this country, they must have viewed it as a circumstance that was in no degree likely to affect their intention of continuing 'there.' 'On the situation of persons settled there previous to the time 'of British possession, I feel myself,' said the judge, 'obliged to pronounce 'that they must be considered in the same light as persons resident in 'Amsterdam. It must be understood, however, that if there were among 'these, any who have been actually removing, and that fact is properly 'ascertained, their goods may be capable of restitution. All that I mean

' to express is, that there must be evidence of an intention to remove, on ' the part of those who settled prior to British possession, the presumption ' not being in their favor.'

This having been a hostile seizure, though made before the declaration
p. 306 of war, the property is held equally | liable to condemnation as if captured the instant of that declaration.

So much of the case as relates to those Claimants who had settled during British possession, proves that other circumstances than an actual getting into motion for the purpose of returning to his own country, may create a presumption of intending to return; and may put off that hostile commercial character which a British subject residing and trading in the country of an enemy, is admitted to acquire. The settlement having been made in a country which, at the time, was in possession of Great Britain, though held only by the right of conquest—a tenure known to be extremely precarious, and rarely to continue longer than the war in which the acquisition is made, is sufficient to create this presumption; but the case does not declare negatively that no other circumstances would be sufficient.

I am aware that the part of the case which applies to Claimants who had settled previous to British possession, will, at first view, appear to have a strong bearing on the question before the Court. The shipment was in time of peace, and the seizure was made before the declaration of war. The trade was one in which a British subject, in time of peace, might lawfully engage. However strong his intention might be to return to his native country in the event of war, he could not be expected to manifest that intention before the actual existence of war. The re-conquest of the island followed the declaration of war so speedily, as scarcely to leave time for putting in execution the resolution to return, had one been formed. Taking these circumstances into view, the condemnation would seem to be one of extreme severity. Yet even this case, admitting the decision to be perfectly correct, does not, I think, when accurately examined, go so far as to justify a condemnation under such circumstances as belong to some of the cases at bar.

The island having surrendered during war, such of its inhabitants as were originally British subjects were not allowed to derive, from this re-annexation to the dominions of Great Britain, the advantages to which
p. 307 a voluntary return to their own country, of the same | date, would have entitled them. They were considered as if they had been ' residents of Amsterdam.'

But *sir William Scott* observes, that ' if there are among these any who have been actually removing, and that fact is properly ascertained, their ' goods may be capable of restitution.' ' Actually removing '—when? Not, surely, before the seizure; for that was made in time of peace. Not

before the declaration of war, when the original seizure was converted into a belligerent capture ; for until that declaration was known, a person whose intention to remain or return was dependent on peace or war, would not be ' actually removing.' On every principle of equity, then, the time to which these expressions refer, must be the surrender of Demarara, or a reasonable time after the declaration of war was known there. The one period or the other would be subsequent to that event which was deemed equivalent to capture.

It is not unworthy of remark, that *sir William Scott* adds explanatory words which qualify and control the words ' actually removing,' and show the sense in which he used them. ' All,' says the judge, ' that I mean ' to express is, that there must be evidence of an *intention* to remove, on ' the part of those who settled prior to British possession, the presumption ' not being in their favor.'

It would, then, I think, be rejecting a part, and a material part, of the opinion, to say that an intention to remove clearly proved, though not accompanied by the fact of removal, would have been deemed insufficient to support the claim for restitution.

Were there no other circumstances of real importance in this case—did it rest solely on the sentiments expressed by the judge, unconnected with those circumstances, I should certainly consider it as leaving open to the Claimants before this Court, the right of proving an intention to return within a reasonable time after the declaration of war, by other overt-acts than an actual removal.

But there are other circumstances which I cannot | deem immaterial ; p. 308
and, as the opinions of a judge are always to be taken with reference to the particular case in which they are delivered, I must consider these expressions in connexion with the whole case.

The probability is, that the Claimants were not merely British merchants. Though the fact is not expressly stated, there is some reason to believe that they had become proprietors of the soil, and were completely incorporated with the Dutch colonists. They are not denominated merchants. They are spoken of, through the case, not as residents, but as settlers. ' They had passed,' said sir William Scott, ' from one ' sovereignty to another with indifference.' This mode of expression appears to me to indicate a more permanent interest in the country—a more intimate connexion with it than is acquired by a merchant removing to a foreign country, and residing there in time of peace, for the sole purpose of trade. And in another of the same class of cases, it is said that, previous to the last war, the principal plantations of the island were in possession of British planters from the other British islands.

The voyage, too, in making which the *Diana* was captured, was a direct voyage between the colony and the mother country. The trade

was completely Dutch; and the property of any neutral, wherever residing, if captured in such a voyage, during war, would be condemned.

But it is still more material that those who settled in Demarara before British possession, must have settled during the war which was terminated by the treaty of Amiens; or, if they settled in time of peace, must have continued there while the colony was Dutch, and while Holland was at war with Great Britain. Which ever the fact might be, whether they had settled in an enemy country during war, or had continued, through the war, a settlement made in time of peace, they had demonstrated that war made no change in their residence. In their case, then, it might be correctly said, 'that war created no presumption of an 'intention to return'—'that they passed from one sovereignty to another 'with indifference.' |

p. 309 I cannot consider claims under these circumstances, as being in the same equity with claims made by persons who had removed into a foreign country, in time of peace, for the sole purpose of trade, and whose trade would be annihilated by war.

The case of the *Boedes Lust* differs from the *Diana* only in this: the Claimants are not alleged to have been originally British subjects. Restitution was asked, because the property did not belong to an enemy at the time of shipment, nor at the time of seizure, nor at the time of adjudication. These grounds were all declared to be insufficient. The original seizure was provisionally hostile; and the declaration of war consummated the right to condemn, and vested the property in the crown, as enemy property. The subsequent change in the character of the Claimants, who became British subjects by the surrender of Demarara, could not divest it. 'Where property is taken in a state of hostility,' said *sir William Scott*, 'the universal practice has ever been to hold it subject 'to condemnation, although the Claimants may have become friends and 'subjects prior to adjudication.' 'With as little effect,' he added, 'can 'it be contended that a *postliminium* can be attributed to these parties. 'Here is no return to the original character, on which only a *jus postliminii* 'can be raised. The original character at the time of seizure, and immediately prior to the hostility which has intervened, was Dutch. The 'present character, which the events of war have produced, is that of 'British subjects; and, although the British subject might, under circumstances, acquire the *jus postliminii*, upon the resumption of his 'native character, it never can be considered that the same privilege 'accrues upon the acquisition of a character totally new and foreign.'

This opinion is certainly not decisive; but it appears to me rather to favor than oppose the idea, that a merchant residing abroad, and taking measures to return on the breaking out of war, may entitle himself to the *jus postliminii*, with respect to property shipped before a knowledge of the war.

The *President* was captured on a voyage from the | Cape of Good Hope p. 310
to Europe. Mr. Elmslie, the Claimant, was born a British subject, but claimed as a citizen of the United States. He had removed to the Cape of Good Hope, during the preceding war, and still resided there. The property was condemned. In delivering his opinion, *sir William Scott* observed, ' It is said the Claimant is intitled to the benefit of an intention ' of removing to Philadelphia, in a few months. A mere intention to ' remove, has never been held sufficient without some overt-act, being ' merely an intention residing secretly and undistinguishably in the breast ' of the party, and liable to be revoked every hour. The expressions of the ' letter in which this intention is said to be found, are, I observe, very ' weak and general, of an intention merely *in futuro*. Were they even much ' stronger than they are, they would not be sufficient. Something more ' than mere verbal declaration, some solid fact showing that the party ' is in the act of withdrawing, has always been held necessary in such ' cases.'

It is to be held in mind, that this opinion is delivered in the case of a person who has fixed his residence in an enemy country, during war, and that he claimed to be the subject of a neutral state. For both these reasons, the war afforded no presumption of his intending to return either to his native or adopted country. To the vague expression of an intention to return at some future indefinite time, no influence can be ascribed. When the judge says that ' something more than mere verbal declaration, some ' solid fact showing that the party is in the act of withdrawing, has always ' been held necessary in such cases,' I do not understand him to say that the person must have put himself in personal motion to return, must have commenced his voyage homeward, in order to be considered as in ' the act of withdrawing.' Many other overt-acts, as selling a commercial establishment, stopping business, making preparations to return, accompanied by declarations of the intent, and not opposed by other circumstances, may, in my opinion, be considered as acts of withdrawing.

In the case of the *Ocean*, *sir William Scott* said ' This claim relates to ' the situation of British subjects settled | in a foreign state, in time of p. 311
' amity, and taking early measures to withdraw themselves, on the ' breaking out of war. The affidavit of claim states that this gentleman ' had been settled as a partner in a house of trade in Holland, but that ' he had made arrangements for the dissolution of the partnership, and ' was only prevented from removing personally, by the violent detention ' of all British subjects who happened to be within the territories of the ' enemy, at the breaking out of the war. It would, I think, under these ' circumstances, be going further than the principle of law requires, ' to conclude this person by his former occupation, and by his present ' constrained residence in France, so as not to admit him to have taken

' himself out of the effect of supervening hostilities, by the means which ' he had used for his removal.'

If other means for removal were taken, than arrangements for the dissolution of the partnership, they are not stated ; and it is fairly to be presumed, that these arrangements were the most prominent of them, since that fact is alone selected and particularly relied upon. In his statement of the case, the reporter says that the Claimant had actually made his escape and returned to England, in July, 1803 ; (the trial was in January, 1804) but this must be a mistake, or is a fact not adverted to by the judge, since he says, in his opinion, that the Claimant is, at the time, ' a constrained resident of France.'

I shall notice two other cases which are frequently cited, though I have seen no full report of either of them.

The first is the case of Mr. *Curtissos*. This gentleman, who was a British subject, had gone to Surinam in 1766, and from thence to St. Eustatius, where he remained till 1776. He then went to Holland to settle his accounts, and with an intention, ' *as was said,*' of returning afterwards to England to take up his final residence. In December, 1780, orders of reprisal were issued by England against Holland. On the first of January, 1781, the *Snelle Zeylder* was captured, and, on the 5th of March and 10th of April, 1781, the vessel and cargo were condemned as Dutch
p. 312 property. On | the 27th of April, 1781, Mr. *Curtissos* returned to England : and, on an appeal, the sentence of condemnation was reversed by the lords of appeals, and restitution decreed.

Other claims of Mr. *Curtissos* were brought before the Court of admiralty ; and, on a full disclosure of these circumstances, restitution was decreed, before the decree of the lords in the case of the *Snelle Zeylder* was pronounced.

The principle of this decree is said to be, that Mr. *Curtissos* was *in itinere*, and had put himself in motion, and was in pursuit of his original British character.

I do not mean to find fault with this decision ; but certainly it presents some strong points more unfavorable to the Claimant than will be found in some of the cases now before this Court. Mr. *Curtissos* had obtained a commercial domicil in the country of the enemy. At the time of the sailing, capture and condemnation of the *Snelle Zeylder*, he still resided in the country of the enemy. But it is said he was *in itinere* ; he was in motion in pursuit of his original British character. What was this journey he is said to have been performing in pursuit of his original character ? He had passed from one part of the dominions of the united provinces to another. He had moved his residence from St. Eustatius to Holland, where he remained from the year 1776 till 1781—a time of sufficient duration for the acquisition of a domicil, had he not previously

acquired it. This change of residence, to make the most of it, is an act too equivocal in itself to afford a strong presumption that it was made for the purpose of returning to England. Had his stay in Holland even been short, a colonial merchant trading to the mother country, may so frequently be carried there on the business of his trade, that the fact can afford but weak evidence of an intention to discontinue that trade: but an interval of between four and five years elapsed between his arrival in Holland and his departure from that country, during which time he is not stated to have suspended his commercial pursuits, or to have made any arrangements, such as transferring his property to England, or making an establishment there, which might indicate, | by overt-acts, the intention p. 313
of returning to his native country. This journey to Holland, connected with this long residence, would seem to me to be made as a Dutch merchant for the purpose of establishing himself there, rather than as preparatory to his return to England. But it was said that he intended to return to England. How was this intention shown? If not by his journey to Holland and his long residence there, it was only shown by his being employed in the settlement of his accounts while a merchant at St. Eustatius, a business in which he would of course engage, whatever his future objects might be. This equivocal act does not appear to have been explained, otherwise than by his own declarations; nor does it appear that these declarations were made previous to the capture.

But could I even admit that the journey from St. Eustatius to Holland was made with a view of passing ultimately from Holland to England, yet the intention was not to be immediately executed. The time of carrying it into effect, was remote and uncertain; subject to so many casualties that, had not the war supervened, it might never have been carried into effect.

But laying aside these circumstances, the case proves only that being *in itinere*, in pursuit of the native character, divests the enemy character acquired by residence and trading; it is not insinuated that this character can be divested by no other means.

Mr. *Whitehill's* case, though one of great severity, does not, I think, overturn the principle I am endeavoring to sustain. He went to St. Eustatius but a few days before admiral Rodney and the British forces made their appearance before that place. But it was proved that he went for the purpose of making a permanent settlement there. No intention to return appears to have been alleged. The recency of his establishment seems to have been the point on which his claim rested.

This case, in principle, bears on that before the Court, so far only as it proves that war does not, under all circumstances, necessarily furnish a presumption, that the foreigner residing in the enemy country, intends to return to his own. The circumstances of this | case, so far as we under- p. 314

stand them, were opposed to the presumption that war could affect Mr. *Whitehill's* residence. War actually existed at the time of his removal; and had that fact been known to him, there would have been no hardship in his case. He would have voluntarily taken upon himself the enemy character at the same time that he took upon himself the Dutch character. There is reason to believe that the Court considered him in equal fault with a person removing to a country known to be hostile. St. Eustatius was deeply engaged in the American trade, which, from the character of the contest, was, at that time, considered by England as cause of war, and was the fact which drew on that island the vengeance of Britain. Mr. *Whitehill* could have fixed himself there only for the purpose of prosecuting that trade. 'He went,' says *sir William Scott*, 'to a place which had rendered itself particularly obnoxious by its conduct in that war.' This was certainly a circumstance which could not be disregarded, in deciding on the probability of his intending to remain in the country in the event of war.

These are the cases which appear to me to apply most strongly to the question before this Court. No one of them decides, in terms, that the property of a British subject residing abroad in time of amity, which was shipped before a knowledge of war, and captured by a British cruizer, shall depend, conclusively, on the residence of the Claimant at the time of capture, or on his having, at that time, put himself in motion to change his residence. In no case which I have had an opportunity of inspecting, have I seen a *dictum* to this effect. The cases certainly require an intention, on the part of the subject residing and trading abroad, to return to his own country, and that this intention should be manifested by overt-acts; but they do not, according to my understanding of them, prescribe any particular overt act, as being exclusively admissible; nor do they render it indispensable that the overt act should, in all cases, precede the capture. If a British subject residing abroad for commercial purposes, takes decided measures, on the breaking out of war, for returning to his native country, and especially if he should actually return, his claim for the restitution of property shipped before
p. 315 his knowledge of | the war, would, I think, be favorably received in a British Court of admiralty, although his actual return, or the measures proving his intention to return, were subsequent to the capture. Thus understanding the English authorities, I do not consider them as opposing the principle I have laid down.

An American citizen having merely a commercial domicil in a foreign country, is not, I think, under the British authorities, concluded, by his residence and trading in time of peace, from averring and proving an intention to change his domicil on the breaking out of war, or from availing himself of that proof in a Court of admiralty. The intrinsic

evidence arising from the change in his situation, produced by war, renders it extremely probable that in this new state of things he must intend to return home, and will aid in the construction of any overt-act by which such intention is manifested. Dissolution of partnership, discontinuance of trade in the enemy country, a settlement of accounts, and other arrangements obviously preparatory to a change of residence, are, in my opinion, such overt-acts as may, under circumstances showing them to be made in good faith, entitle the Claimant to restitution.

I do not perceive the mischief or inconvenience that can result from the establishment of this principle. Its operation is confined to property shipped before a knowledge of the war. For if shipped afterwards, it is clearly liable to condemnation, unless it be protected by the principle that it is merely a withdrawing of funds. Being confined to shipments made before a knowledge of the war, the evidence of an intention to change or continue a residence in the country of the enemy, must be speedily given. A continuance of trade after the war, unless, perhaps, under very special circumstances, and for the mere purpose of closing transactions already commenced, would fix the national character and the domicil previously acquired. An immediate discontinuance of trade, and arrangements for removing, followed by actual removal within a reasonable time, unless detained by causes which might sufficiently account for not removing, would fix the intention to change the domicil, and show that the intention to return had never been abandoned; that the intention to remain always had never | been formed. It is a case in p. 316
which, if in any that can be imagined, justice requires that the citizen, having entirely recovered his national character by his own act, and by an act which shows that he never intended to part with it finally, should, by a species of the *jus postliminii*, be allowed to aver the existence of that character at the instant of capture. In the establishment of such a principle, I repeat, I can perceive no danger. In its rejection, I think I perceive much injustice. An individual whose residence abroad is certainly innocent and lawful, perhaps advantageous to his country, who never intended that residence to be permanent, or to continue in time of war, finds himself, against his will, clothed with the character of an enemy, so conclusively that not even a return to his native country can rescue from that character and from confiscation, property shipped in the time of real or supposed peace. My sense of justice revolts from such a principle.

In applying this opinion to the Claimants before the Court, I should be regulated by their conduct after a knowledge of the war. If they continued their residence and trade after that knowledge, at any rate after knowing that the repeal of the orders in council was not immediately followed by peace, their claim to restitution would be clearly unsus-

tainable. If they took immediate measures for returning to this country, and have since actually returned, or have assigned sufficient reasons for not returning, their property I think may be capable of restitution. Some of the Claimants would come within one description, some within the other. It would, under the opinion given by the Court, be equally tedious and useless to go through their cases.

My reasoning has been applied entirely to the case of native Americans. This course has been pursued for two reasons. It presents the argument in what I think its true light ; and the sentence of condemnation makes no discrimination between native and other citizens.

The Claimants are natives of that country with which we are at war, who have been naturalized in the United States. It is impossible to deny that many of the strongest arguments urged to prove the probability
p. 317 that war must determine the native American citizen to abandon | the country of the enemy and return home, are inapplicable, or apply but feebly, to citizens of this description. Yet I think it is not for the United States, in such a case as this, to discriminate between them.

I will not pretend to say what distinctions may or may not exist between these two classes of citizens, in a contest of a different description. But in a contest between the United States and the naturalized citizen, in a claim set up by the United States to confiscate his property, he may, I think, protect himself by any defence which would protect a native American. In the prosecution of such a claim, the United States are, I think, if I may be excused for borrowing from the common law a term peculiarly appropriate, *estopped* from saying that they have not placed this adopted son on a level with those born in their family.

LIVINGSTON, *J.* concurred in opinion with the Chief Justice.

The Merrimack.

(8 Cranch, 317) 1814.

Goods purchased by British merchants, before the war, between the United States and Great Britain, in pursuance of orders from American citizens, shipped to the agent of the British merchants in the United States, also an American citizen, 'on account and risk of an American citizen,' and no circumstances of fraud or unfairness appearing in the transaction—were vested in the American citizens at the time of the shipment, and are not liable to condemnation, although the vessel sailed from England after the declaration of war was known there. Restitution.

But if goods be purchased as above, though the accompanying invoices, bills of lading and letters be addressed by the British consignors to the American citizens for whom the purchase was made, and all concur to show the property to be in them, yet if these documents are inclosed in a letter from the consignors to their agent in the U. States, though an American citizen, directing him not to deliver the goods in case of the existence of certain circumstances, nor until he should have received payment from the consignees in cash—the property

in the said goods continued in the British consignors at the time of capture Condemnation.

Goods by the same ship, purchased as above, & consigned to the agent of the consignors, being an American citizen, in whose name also the bill of lading is made out, but the bill of parcels and invoice in the name of the American merchants for whom the purchase was made; the shipment also being expressed to be on their account, though the goods are spoken of in the letter of the consignors as British property; vested in the American merchants at the time of shipment. The circumstance that the goods continue, during the whole voyage, at the risk of the shippers, is immaterial. Restitution.

THIS was an appeal from the decree of the Circuit Court for the district of Maryland.

The following are the material facts of the case:

The ship Merrimack, owned by citizens of the United States, sailed from Liverpool for Baltimore, a few days after the declaration of war, by the United States against Great Britain, *was known* in that country, having on board a cargo of goods shipped by British subjects, and consigned to citizens of the United States. On the 25th of October, 1812, she was captured, in the Chesapeake bay, between Annapolis and Baltimore, by the private armed vessel *Rossie, Joshua Barney*, commander.

The goods, being libelled as prize in the District | Court of Maryland, p. 318
were severally claimed by sundry citizens of the United States.

These several claims, and the circumstances connected with them respectively, were thus stated by MARSHALL, *Ch. J.* in delivering the opinion of the Court:

1. William and Joseph Wilkins, merchants of Baltimore, claimed the goods contained in eleven cases and one bale marked W. J. W.

These goods were made up for them, in pursuance of their orders, before the war was known in Great Britain, by a manufacturing company, one member of which, Thomas Leich, resided in Leicester, in Great Britain, and the other, Edward Harris, was an American citizen residing in the United States.

The bill of parcels was in the name of Messrs. William and Joseph Wilkins. This paper also served for an invoice, and there was no other on board for these goods.

The bill of lading was in the name of Edward Harris, who was the consignee.

The goods were accompanied by a letter from Thomas Leich to Edward Harris, dated Leicester, the 29th of July, 1812, in which he says, 'With this you will receive bill of lading of 11 cases of worsted 'and cotton hosiery for Messrs. W. and J. Wilkins, Baltimore, and with 'insurance to 892*l.* 5. It is a large sum, but, from what I can learn, 'they are very respectable. Indeed Mr. Brown of the house of Chancellor '& Co. came with him, and seemed almost offended that did not send

'the cotton hose he ordered before, and said he would guarantee the 'amount of the worsted goods, therefore must have offended him if 'did not comply. Have not sent but about half the cotton goods they 'ordered,' &c. 'informed them that we thought it necessary to secure 'our property to ship all to you, as you could prove that they were 'American property by making affidavit they are *bona fide* your property. 'As our orders in council are repealed, hope your government will be
p. 319 'amicably inclined as well, and | that trade will be on regular footing 'again, but for fear there should be some other points in dispute, I shall 'send you, and our friends through your hands, all the goods prepared 'for your market which you'll perceive is very large.' 'Hope you will 'approve of my sending all, and as there may have been some alterations 'in some of your friends, shipping them to you gives the power of keeping 'back to you.'

There was also on board, a letter dated Leicester, 22d July, 1812, signed Harris, Leich & Co. and addressed to Messrs. Wm. and Joseph Wilkins, merchants of Baltimore, in which they say, 'The repeal of the 'orders in council having been agreed on by our government, we have 'availed ourselves of the opportunity of sending the greater part of 'your spring and fall orders,' &c. 'As we are not certain that your 'government will protect British property, we have thought it right 'to ship all ours under cover to Mr. Harris, who can claim as his own '*bona fide* property, and he, being a citizen of the United States, thought 'proper to use every precaution, having received some unpleasant 'accounts about your government having agreed on war with this 'country, which we hope will not be the case.'

2. M'Kean and Woodland, citizens of the United States, claim sundry parcels of goods, part of the same cargo, as their property.

These goods were purchased by Baily, Eaton and Brown, merchants of Sheffield, in pursuance of orders from the Claimants. They were shipped to Robert Holladay, also an American citizen. The bill of lading was to Robert Holladay, '*on account and risk of an American citizen.*' The invoice was also headed to Robert Holladay.

A letter from Baily, Eaton and Brown to Samuel M'Kean, dated 11th July, 1812, says, 'A few days ago we received a letter from Mr. 'Rogerson, of New York, informing us that the partnership of Messrs. 'M'Kean and Woodland was dissolved, but he does not say whether 'you or Mr. Woodland continue the business, or whether both of you 'decline it. We have purchased about 3,000*l.* sterling of goods by order
p. 320 'of | the late firm, and on their account, most of which have been pur- 'chased and paid for by us, from fifteen to eighteen months ago, and 'have been on our hands waiting for shipment. We have this day given 'orders to our shipper at Liverpool, to put them on board a good American

'vessel sailing for your port with a British license; but from the un-
'certainty we are in respecting the particulars of your dissolution of
'partnership, and, in fact, not knowing whether to consign them to you
'or Mr. Woodland, we have finally concluded to consign them to Mr.
'Holladay, with whom you will be pleased to make the necessary arrange-
'ments respecting them.' 'We have addressed the invoice to Mr. Holla-
'day to your care; and directly on receiving it, if he should not be in
'Baltimore, you will please advise him of its arrival.'

The residue of the letter contains their reasons for hoping that Mr. M'Kean will not insist on the usual credit, but will remit immediately on receiving the goods. This request is founded on their having been so long in advance for the purchase of them.

Messrs. Baily, Eaton and Brown addressed a letter to Mr. Holladay, dated the 10th of July, 1812, in which they say, 'Enclosed you will 'receive invoices of sundry goods for Messrs. M'Kean and Woodland, 'which complete their orders.' They then assign the same reason for shipping the goods to Mr. Holladay, that is given in their letter to Mr. M'Kean; and, after directing him to arrange with Mr. M'Kean, add, 'We cannot view this consignment at all in the light of an inter-'cepted shipment coming within the meaning of the articles of agree-'ment between you and us.' This letter also contained a proposition for immediate remittance, founded on the time which had elapsed since the goods were purchased. This proposition, they say, is made to all their friends in the United States, and they hope none will refuse to accede to it. 'But,' they add, 'in thus acting, we have left the matter to the free and unbiassed will of our friends, and they are certainly upon *honor*.'

3. Messrs. Kimmel and Albert, merchants of Baltimore, claimed seven packages of goods on board the | Merrimack, which were purchased, p. 321
in pursuance of their orders, by Baily, Eaton and Baily. The invoice, bill of lading, and letters, addressed (one by the consignors and the other by the shipper, who was their agent) to Messrs. Kimmel and Albert, concur in showing property in the Claimants. But all these documents and letters are inclosed in a letter of the 5th of August, 1812, written by Baily, Eaton and Baily to Samuel M'Kean. In this letter, the writers refer to a former letter of the 3d of July, in which they informed Mr. M'Kean that they should, on the recommendation of their general agent, Mr. Hollaway, inclose their invoices and bills of lading for the adjacent country to him, and requested him to make inquiries into the circumstances of their correspondents, and be regulated, as to putting the letters, &c. into the post-office so as to reach the persons to whom they might be addressed, by the result of those inquiries. Messrs. Baily, Eaton and Baily indulge the hope that the repeal of the British orders in council will restore peace between the two countries, in which event

M'Kean is still to be governed by their letter of the 3d of July. 'But,' they add, 'if, when you receive our invoices and bills of lading, a state 'of war should really continue, it will be proper not to deliver these 'goods until you have received the amount of the invoices from the 'consignees, in cash.'

4. John H. Browning & Co. were also Claimants of part of the cargo.

This claim stood on precisely the same principles with that of Kimmel and Albert. The documents given in evidence, were, in effect, the same, and were enclosed in the same letter from Baily, Eaton and Baily to Samuel M'Kean.

It was contended by the captors, in the District Court, that, from the papers and letters on board, it appeared that the goods were not sold and delivered in England, so as to vest the property in the Claimants, but were sent to the agents of the shippers in the United States, to be delivered or not, according to their discretion: consequently, that the property was not changed, and the goods, therefore, were liable to capture as British property. |

p. 322 Restitution was decreed in the District Court, and the decree was affirmed in the Circuit Court. An appeal was taken to this Court, where the captors pray condemnation on the same grounds as in the Courts below.

HARPER, *for the Appellants*,

After stating the facts of the case, argued that the claims of the captors to the several parts of the cargo in question all rested on the same principle; viz. That no transfer of the property had taken place at the time of the capture. The shippers were British subjects.

1st. As to the property claimed by William and Joseph Wilkins.

It appears, from the evidence introduced into this part of the cause, that the goods were not to be delivered to the Claimants, until they had come first to the hands of the shippers' agent, who was to decide upon the solvency of W. and J. Wilkins, and to regulate himself accordingly, with regard to the delivery of the goods. He even had a power, under certain circumstances, to make them his own. W. and J. Wilkins were also to have an option, either to take the goods or not. But a more powerful argument than either, is, that the shippers themselves, in their letters both to the consignee and the Claimants, denominate these goods *British property*, and express their apprehensions that the American government will not protect it. Again, if these goods had been lost at sea, they could not have been charged to the Messrs. Wilkins, as goods sold and delivered. The loss would clearly have been the loss of the shippers. The property in this part of the cargo cannot, therefore, be considered as having been vested in W. and J. Wilkins. It was clearly in the British shippers, both at the time of shipment, and at the time

of capture. The claim of the Messrs. Wilkins ought, therefore, to be rejected.

2d. As to the claim of M'Kean and Woodland, HARPER, stated the facts, and prayed condemnation on the general principle that the property had not been transferred.

3d and 4th. In opposing the respective claims of | Kimmel and Albert, p. 323
and of John H. Browning & Co. the counsel for the captors argued on nearly the same grounds as in the case of W. and J. Wilkins; and, in addition thereto, he urged the condition of payment which was annexed to these two cases, and which was to be performed before the delivery of the goods to the Claimants.

He also made a second point, in regard to all the claims, viz. That, admitting the goods to have been the property of American citizens, yet, since the declaration of war was known in Liverpool, at the time of the shipment, the Claimants are to be considered as having been engaged in a hostile trade, which gives the property an enemy character, and subjects it to condemnation. The shippers on this supposition, must be looked upon as the agents of the Claimants, and the acts of agents, are, in law, the acts of their principals.

PINKNEY, *contra, for the Claimants.*

If the title of the Claimants be good in equity, it is sufficient; but it is good at law, as well as in equity.

In examining the several claims, I shall follow the order which has been pursued by the counsel for the captors.

First, as to the claim of W. and J. Wilkins. The invoice and bill of parcels show the purchase by the Claimants. The bill of parcels is always good evidence, in an action on a policy, to show interest. The invoice corresponds with the bill of parcels, and is not contradicted by the bill of lading. Leich's letter to Harris speaks of the goods as being 'for Messrs. W. and J. Wilkins.' These circumstances are strongly in our favor. It has been urged, however, on the other side, that the property of the goods could not have been in the Claimants at the time of capture, because, 1st. There was a condition of payment, without complying with which, the goods were not to be delivered; and 2d, because there was a power vested in Harris, to keep back the property, in case of the insolvency of the Wilkins's. The first objection is founded on an error in fact. The objection, if applicable to the Claimants of the other parts | of the cargo is not so here. It appears, indeed, in some part of the evi- p. 324
dence, that an inducement to prompt payment was held out to the Wilkins's, viz. an offer to allow seven per cent. discount for prompt payment; but there was no express condition of payment. The second objection, viz. that Harris was empowered to keep back the goods, in case of the insolvency of the Claimants, is easily answered. Insolvency

of the parties was the sole ground on which Harris could retain the goods ; but this is only the same power which the shipper himself would have had by the general law in maritime cases, if he had consigned the goods directly to the Wilkins's. It is the general law, in case of the insolvency of the consignee, that the shipper may stop the goods *in transitu in itinere*, although purchased in England, if the purchase was on credit. The intervention of Harris, in this case, merely gives a facility to the right which the shippers before possessed. 4 *Rob.* 21, 25. *The Josephine.*

It is also urged, that the shippers themselves, in their letters, have denominated the goods in question, *British property*, and expressed an apprehension that it would not be protected by the American government, and have therefore suggested to Harris, that he could swear they were *his*. This objection possesses little weight. A mere attempt to conceal belligerent property only deprives the party of the benefit of *further proof*, but is not a ground of confiscation. 4 *Rob.* 161, 195. *The Madonna delle Gracie.—Gregory's case.*

2d. As to the claim of M'Kean and Woodland. Two objections to this claim, arising from the letter of Baily, Eaton and Brown to M'Kean, have been urged by the captors.

1st. The consignment to Holladay.

2d. The expectation of the shippers that M'Kean and Woodland would pay cash.

The consignment to Holladay needs no farther explanation than is to be found in the letter which states the fact. The shippers, having heard that the partnership of M'Kean and Woodland was dissolved, were uncertain to which of them the consignment ought to be made, and
p. 325 therefore determined to consign the goods to Holladay. But the property vested in M'Kean and Woodland, notwithstanding this intermediate consignment. In a Court of prize, such intermediate consignment is not considered as altering, in any degree, the nature of the case.

2d. Though the letter from the shippers requests an immediate cash payment, there is no express condition to that effect : there is merely an appeal to the justice and honor of the Claimants.

An additional proof that the property was in the Claimants, is, that it was insured for them and not for the shippers.

It appears that all the bills of lading, except that for W. and J. Wilkins, express the shipments to have been made on account and risk of American citizens generally. The reason for this general mode of expression was the uncertainty of the shippers respecting the dissolution of the partnership.

3d and 4th. We now come to the claims of Kimmel and Albert, and Browning & Co. which depending on precisely the same principle, will be examined together.

In these two cases only, is there an absolute condition of payment. But the goods had been regularly ordered by the Claimants, long before they were shipped. They were finally shipped for them, and in pursuance of their orders. They were delivered to the master of a general ship. The invoice, bill of lading and letters, all concur in showing property in the Claimants. The legal property vested in them by the delivery of the goods to the master. The shipper, having delivered them to the master, was *functus officio*, and could not thereafter stop the goods on any ground but the insolvency of the consignee, which is the only case of stoppage *in transitu* authorized by the common law or the law maritime. 1 *Rob.* 181, 219. *The Aurora.* (*Conversation between sir W. Scott and Dr. Lawrence.*) 6 *Rob.* 325, 6, 7. *The Constantia.*

Again. Can a captor divest the eventual rights of citizens, or does he take the property subject to the conditions to which it would be subject in the hands of the consignor or his agent? We contend for the latter | doctrine. The rights of the citizen become absolute upon his complying p. 326 with those conditions. In the present case, if the goods had arrived at their port of destination without capture, the title to them would have become absolute in Kimmel and Albert, upon payment to the consignor of the amount required: And, as the captor, according to our doctrine, does but stand in the place of the consignor, we contend that the property will become equally absolute in the Claimants upon making the same payment to him.

We do not admit the doctrine, that property cannot, upon the high seas, pass *in transitu*, so as to defeat the captors. Suppose it had been agreed that the property should change after it had passed a certain degree of longitude; would not the agreement be carried into effect, upon that degree of longitude being past? But it is not now necessary to contend for this doctrine, because the property in the present case, was vested in the Claimants, upon the shipment, liable, however, to be divested upon a condition.

There is manifest inconsistency in the English prize law. A belligerent lien will be condemned, but a neutral lien will not be protected: neutral property may become belligerent *in transitu*, but belligerent property cannot become neutral. This Court will adopt the reason of the rule, but not the rule itself.

HARPER, *in reply*.

In this case, there was no transfer of either an equitable or legal right. In the case of W. and J. Wilkins, the delivery of the goods was only to Harris; or to the master of the ship, who, by undertaking to deliver them to Harris, became *his* agent, and not the agent of the Wilkins's. So with regard to the invoice, bill of lading and bill of parcels; they were all delivered, not to the Wilkins's, but to Harris or his agent, the

master. No evidence of the title of W. and J. Wilkins was put in a course to reach them, but through the agency of Harris, who was not to deliver it at all, but in a certain event. The goods, although purchased by order of the Claimants, were not delivered to them. The Claimants could not have maintained an action for them, either at law or in equity. |

p. 327 M'Kean and Woodland's case is still stronger against them. The business of that concern was not continued by any person. They have become insolvent. Holladay has the absolute control over the goods. He was to make arrangements with the Claimants or with M'Kean alone, and was to require cash.

*Saturday, March 12th. Absent....*LIVINGSTON, *J.*

MARSHALL, *Ch. J.*

After stating the facts relating to the several claims in this case, delivered the following opinion of the Court, as to the claims of M'Kean and Woodland, Kimmel and Albert, and John H. Browning & Co.

1. As to the claim of M'Kean and Woodland.

The question of property, in this case, depends on certain letters written by Baily, Eaton and Brown, which were found on board the captured vessel. A letter of the 11th of July, 1812, addressed to Samuel M'Kean, shows in the clearest manner, that the property in dispute was purchased and shipped for M'Kean and Woodland, in pursuance of their orders ; and accounts for assigning it to Mr. Holladay.

There is nothing in the cause which can throw the slightest suspicion on the fairness of this transaction. It unquestionably is, what, on the face of these letters, it purports to be, a purchase for M'Kean and Woodland, made in pursuance of their orders, and shipped for them to Robert Holladay, because, in the moment of shipment, information was received that their partnership was dissolved, and the shipper had no instructions in what manner to direct to them. In this situation, he considered himself as acting most certainly for their advantage by addressing the goods to an agent residing in the same town with M'Kean and Woodland, who should receive them to their use. In such a case, the Court is of opinion that the property was vested in M'Kean and Woodland, and is, consequently, not liable to condemnation as enemy property.

The sentence is affirmed. |

p. 328

2. As to the claim of Kimmel and Albert.

From their letter it is apparent that, in the event of war, Baily, Eaton and Baily, reserved to themselves that power which ownership gives over goods, and instructed their agent, M'Kean, in what manner that power was to be exercised. There being no letter addressed to Kimmel and Albert, but under cover to M'Kean, it is apparent that they were to know nothing of the shipment, unless, in the opinion of M'Kean,

it should be prudent to make the communication ; and even then, the property was to become theirs, not under the original contract, but under a new contract to be made with M'Kean. The delivery on board the ship was a delivery to M'Kean, not absolutely for Kimmel and Albert, but for them provided they acceded to new and distinct propositions made by Baily, Eaton and Baily. In such a case, no change of property could take place till Kimmel and Albert should accede to these new propositions ; and the capture having taken place before the contract was complete, the goods must be considered as enemy property.

The sentence is reversed, and the claim dismissed.

3. The claim of John H. Browning & Co.

This claim stands on precisely the same principles with that of Kimmel and Albert. The documentary evidence is in effect the same, and was enclosed in the same letter from Baily, Eaton and Baily to Samuel M'Kean. The claim therefore must be dismissed.

The sentence is reversed and the claim dismissed.

JOHNSON, *J.* delivered the opinion of the majority of the Court, as to the claim of W. and J. Wilkins, as follows :

The points of distinction between this case and that of M'Kean and Woodland, unfavorable to these Claimants, are the following :

1. That Harris, the direct consignee, had a control given him over the goods, which authorized him, had | he thought proper, to refuse to deliver p. 329
them over to the Wilkins's.

2. That Harris had also a power, under certain circumstances, to make them his own.

3. That, in the letters both to the Wilkins's and Harris, the consignor alleges as his reason for making the shipment through Harris, his fears that this government would not protect British property ; thereby, as is contended, acknowledging this property to be British.

On the other hand, it is a circumstance favorable to this claim, that the original bills of parcels were made directly to the Claimants, and were sent along with the shipment, as a substitute for an invoice.

It is assumed as a postulate, that a direct consignment on account of the consignee, made in pursuance of his orders, is not subject to condemnation as prize of war ; and that it is immaterial whether it be purchased for cash or credit ; or insured in the enemy's country or elsewhere.

It will, then, be enough to show that every beneficial interest which such a shipment would vest in the consignee, was vested in the Claimants in this case.

The first difficulty arises from the circumstance that the bill of lading was made out to Harris, and not to the Wilkins's, whereby the captain of the ship became bound to deliver them to Harris or his assigns.

Upon a fair view of the whole transaction, this distinction will be found rather to be formal than real; and that it produces no difference in the state of right between these parties.

The interest vested in the consignee by the delivery to the captain, is not absolute to all purposes. So far as relates to the right of stoppage *in transitu*, it continues subject to the control of the consignor, and may be reduced by him into possession, before actual delivery; or the
p. 330 authority of the captain to deliver them | according to the original bills of lading, may be countermanded, and another destination given them.

Upon comparing all the circumstances of this case, it will be found that the transaction was so arranged as to produce no other change in the rights of the parties, than to put it in Harris's power to exercise this right of stoppage *in transitu*, in case of the insolvency of the Wilkins's.

The bill of lading is made out to Harris, which gave him the right to demand the goods of the captain.

But the invoice, which has the additional strength of a bill of parcels, is made out to the Claimants, which gave them the right to demand the goods of Harris.

Both in the letter to Harris and to the Wilkins's, the shipment is declared to be on account of the latter; and, in the letter to the former, the shipper goes into a detail of his reasons for giving the Claimants so large a credit.

Thus these papers, taken together, place the interest of the Claimants on the same footing as if the bill of lading had been made out to Harris for the use of the Wilkins's; and in that case, there could have been little doubt that the claim must be sustained.

If the invoice, although made out to the Claimants, had been inclosed to the direct consignee, it would have furnished a strong argument in favor of the captor. But here, the evidence of right is placed in the Claimants' own hands; thereby acknowledging their right in the goods shipped, and furnishing them with the means of asserting it. Thus the shipper could never have denied the rights of the Claimants in this case; for he had furnished the most direct and conclusive evidence against himself.

But it is asserted that Harris had it in his power to make these goods his own, in defiance of the will of the Claimants.

p. 331 If this were the fact, it would only show that, in | either view of the alternative, it was a shipment on American account, and that the shipper had parted with all his interest.

But the fact is not so: and in answering this argument, we answer the remaining one also.

The shipper knew what he was about. War was already probably declared, and he was aware of the crash of mercantile credit which

generally follows on such an event. He also knew that, in case of asserting his right of stoppage *in transitu*, the property reverted and became British; in which case, as he expresses himself, the property might be subjected to seizure, as enemy's property.

With these considerations on his mind, he makes out the bill of lading to Harris, and informs him that his object is to enable him to keep the goods back in case of an alteration in the circumstances of the Claimants: and in this case only is the hint given him that he may claim them as his own. It is contended, that he acknowledges, in his letter to the Claimants, that the property is British. But this is an error in fact. It was necessary to assign some reason or some excuse for not having the bills of lading made out to the Claimants themselves. And for this reason, he urges an apprehension that our government would not protect British property. But this reason could only be applicable in the event of a stoppage *in transitu*; as a direct shipment to the Claimants would have left no room for such an apprehension. In the letter, also, to Harris, it is said, is contained an acknowledgment that the property is British. This, also, is founded in mistake; for the letter to Harris only communicates the reason which had been assigned in the other letter, for having the bill of lading made out as it was. But suppose the passage in the letter to the Claimants, on this subject, had been full and explicit to the declaration of an opinion that the property continued British, although shipped on American account; yet this would have been but an expression of an erroneous opinion, and certainly ought not, as far as the interests of the Claimants are concerned, to have an influence on the decision of this Court. But it is asserted that the goods continued, on the whole voyage at the risk of | the shippers. This p. 332
may be true, and yet it does not prove enough. Had the shipment been direct to the Claimants, and insurance omitted contrary to order or custom, the shippers would have been equally liable, and yet the property would not have been subject to capture. It is enough for the purposes of the Claimants, that the property in the goods had been transferred to them, independently of the control of the shipper or his agent, except so far as the right to stop *in transitu* interfered. And such was the situation of the rights of the parties in this case. The goods ordered by the Claimants were shipped to an agent for their use, subject only to a right which unquestionably, under any circumstances, existed in the shippers. In their letter to the Claimants, they inclose a bill of parcels, by way of invoice, containing a positive acknowledgment of the sale to them; and the letter itself, as well as that to Harris, speaks of the goods expressly as *their* goods. The immediate consignee could, therefore, only be considered as the bailee of the Claimants. Nor does it appear that a tender of the money would have been necessary to entitle them to

receive the goods of Harris, as, in the letter to Harris, it is acknowledged to be a sale on credit, and particular discounts offered as an inducement for an early payment.

Indeed, there are words in the letter to the direct consignee, which amount to a positive declaration that the shipments were not on his account nor on that of the shippers, but for the use and benefit of others. 'I shall send you, *and our friends* through your hands, all the goods prepared for your market.' By connecting these words, with the bills of lading, the result is, that, although the direct consignee was entitled to demand the goods of the captain, yet it was not to his own use, but to the use of the several persons on whose account they were shipped.

Decree affirmed.

STORY, *J.* delivered the following separate opinion, as to the claim of W. and J. Wilkins.

I cannot concur in the opinion of the Court, just delivered, as to the claims of the Messrs. Wilkins. It is true that the goods were purchased pursuant to the orders of Messrs. Wilkins; but I do not think that the
p. 333 property, by the mere purchase, became vested in them; and the usage and course of trade is generally otherwise. The purchase was made with the money of the shipper: and, until a delivery, actual or constructive, to the Messrs. Wilkins, the propriety thereof remained completely in the shipper. The goods were also shipped as the property of the shipper, consigned to the agent of the shipper, and not to the agent of the Messrs. Wilkins, to be delivered only in case of the consignee's being satisfied of their perfect solvency. It is true that the bill of lading purports that the goods are shipped on account and risk of the consignee; but the confidential letters explain the transaction, and shew that the shipment was so made as a cover against belligerent risks; and that the property was not intended to be changed from the British shipper, in its transit. The delivery, then, of the goods on board of a general ship, was no delivery to the Messrs. Wilkins: It was not even a delivery which vested the property of the goods, in the consignee. The legal property and possession thereof still remained in the shippers; and if the goods had actually come to the hands of Mr. Harris, his possession would have been but a continuation of the possession of the shipper. In contemplation of law, the goods were as much under the control and possession of the shipper, as if he had been on board the vessel during the voyage, or had shipped them in his own name. If they had been lost during the voyage, the loss would have been his. He had not a mere right of stoppage *in transitu* in case of insolvency, for that can be exercised only where the property by the shipment is vested in the consignee for his own use; but he had a perfect right of countermand in

all cases whatever. He might sell the property, give it a new direction, control its delivery, and, indeed, exercise all the rights of full dominion and propriety. It seems to me, that if the Messrs. Wilkins had neither a *jus ad rem*, nor a *jus in re*, and the latter only is recognized in prize Courts, they could not, by subsequent acts, overreach the legal rights of the captors. At the time of the shipment and capture, it was, in my view, enemy property liable to condemnation, having no neutral or American *onus* attached to it. It was subject to the legal claims of the creditors of the shipper; and nothing existed in the Messrs. Wilkins but a mere *spes occupandi* or, as the common law phrases it, a mere possibility, which attached | neither to the substance nor the form of the p. 334
thing. Upon what ground, then, if I am right as to the ownership of the goods, can the claim be maintained? The right of capture acts upon the proprietary interest of the thing captured, at the time of capture. It is not affected by the secret liens, or private engagements of the parties. It repudiates even the strong claim of a bottomry bond, because it is not a *jus in re*. Can, then, a mere possibility be of more consideration in a Court of prize? The absence of all authority to this effect, and the strong and emphatic language of all the cases as to secret liens, speak as powerfully as the most direct and pointed decisions against it.

There is a case cited by the Court in the *Aurora*, 4 *Rob.* 218, where property was shipped by a merchant in Holland to A. a person in America, by order of B. and *per account of B.* but with directions to A. not to deliver it unless satisfaction should be given for the payment; and it was held as good prize on the ground that the property still remained in the enemy shipper. This case I think strongly in point; and the manner in which Lawrence attempted to distinguish it from the case then on trial, shews a full concurrence in its correctness. The reasoning of the Court in the *Aurora* itself, and in the *Marianna*, 6 *Rob.* 22, are also illustrative of the general doctrine.

On the whole, I consider that, by the doctrine of the common and the prize law, these goods were, at the time of capture, enemy property; and that the claim of the Messrs. Wilkins, ought to be rejected; and in this opinion I have the concurrence of TWO[1] of my brethren.

Monday, March 14th.

HARPER, suggested diminution of the record in the case of W. and J. Wilkins, and prayed the Court to grant a writ of *certiorari* to the Court below; but the Court refused, the case having been argued and decided.

[1] Judges WASHINGTON and TODD.

The Frances.—Boyer, master (Thompson and al. claimants).

(8 Cranch, 335) 1814.

A naturalized citizen, who, in time of peace, returns to his native country for the purpose of trade, but with the intention of returning again to his adopted country, continuing in the former a year after the knowledge of the existence of war between the two countries, for the purpose of winding up a complicated business, and engaging in no new commercial transactions whatever with the enemy, and actually returning to his adopted country in a little more than a year after his first knowledge of the war; is to be considered as having gained a domicil in his native country—and his goods, captured after the war, liable to condemnation. Goods appearing by the ships papers to be a consignment from alien enemies to American merchants, condemned in toto as prize, although further proof was offered that American merchants were jointly interested, and that they had a lien upon the goods, in consequence of advances made by them. Further proof on these points refused.

This was an appeal from the sentence of the United States' Circuit Court for the district of Rhode Island.

The facts were as follow:

War was declared by the United States against Great Britain on the 18th of June, 1812.

The ship *Frances*, having on board a cargo of goods of British manufacture, consigned to various persons in the United States, sailed from Greenoch, in Scotland, on the 19th of July, in the same year, for New York. On the 28th day of August following, she was captured by the Yankee privateer, and carried into the district of Rhode Island, where the cargo was libelled as enemy property.

Robert and James Thompson and William Steele, naturalized citizens of the United States, claimed a considerable part of this cargo as their own property; and also claimed 130 packages, another part of the same cargo, as being owned by them jointly with British subjects, or as having a lien upon the property in consequence of advances made upon the consignment.

These goods were all consigned by James Thompson, a naturalized citizen of the United States, residing in Scotland, to William Steele, a citizen of the United States, carrying on the business of the concern in New York.

All the goods claimed, except the 130 packages, were incontestibly the property of the Claimants; and, on the trial, restoration of two thirds was decreed to Robert Thompson and William Steele, residents in the United States; in which decree the captors acquiesced. The remaining third, which belonged to James Thompson, who resided in Scotland, was condemned: and from this sentence he has appealed to this Court. |

p. 336 The 130 packages were also condemned as enemy property; and

from this sentence the Claimants have appealed to this Court; but having received more full information than they originally possessed respecting the ownership of these goods, they now abandon their claim as to this property, except as to 66 boxes, of which they still claim to hold a moiety; the other moiety being acknowledged to be the property of Messrs. Dalgleish and Frame, British subjects.

A claim to all the above mentioned goods was also interposed by the United States, for a violation of the non-intercourse laws: which claim was rejected in the Circuit Court, and an appeal taken to the Supreme Court.

James Thompson, as appeared from the evidence, was a native of Scotland, and came to the United States in the year 1793, where he resided, carrying on trade and commerce, till the year 1801. In 1797 he was naturalized. In the year 1801 he went to France, on the commercial business of his house, and, some time afterwards, passed over to England, where he was employed in making purchases for and shipments to his house. In the year 1803 he settled in Glasgow, where he continued doing that part of the business of the partnership which was to be transacted in Great Britain, until the declaration of war. After the knowledge of that event, he transacted no commercial business whatever, and was exclusively employed in arranging his affairs in such manner as would enable him to return to the United States. This being accomplished, he, in August, 1813, engaged a passage on board the cartel ship the Robert Burns, about to sail from Liverpool to New York, but was stopped by the orders of government. He then passed over to Ireland, and privately embarked for the United States, where he arrived in November last. Several affidavits were taken to show that he always considered the United States as his permanent place of residence, and that he uniformly expressed his determination to return. His letters manifested the same intention. It also appeared that his business was complicated, and required his attention after he ceased to engage in new adventures; but it did not appear that he had performed any act which could be considered as | commencing to return, until August 1813, when he engaged p. 337
a passage on board the Robert Burns.

As to the 66 boxes of merchandize, the moiety of which was still claimed by Robert and James Thompson and William Steele, they prayed, on bringing up the cause to this Court, to be allowed to make further proof of their property in the said goods; and offered, as further proof, the affidavit of James Thompson that they were the joint property of the house of Dalgleish and Frame and of Messrs. Thompsons and Steele, under a contract made by two letters which were exhibited, and which he said were original. In addition to this, James Thompson swore that he gave his bill for the moiety of these goods, which bill he had paid, and

that he was prevented from notifying this contract to his partners in his letter to them, by the hurry produced by the shipment. The Claimants offered, also, the affidavit of William Steele, stating that, some time after the papers of the ship Frances were opened, he received the invoice and letters annexed to his affidavit in an *envelope* with some other papers. That the letters were in the hand-writing of John Frame and James Thompson. That, before he received them, he was convinced, from the marks, that the goods in the invoice were, in some respects, the joint property of his house and of Dalgleish and Frame ; which fact he stated to the agents of the captors as well as the judge of the Circuit Court, at the trial in June, 1813 ; and that James Thompson was in the habit of taking goods on joint account from houses in Scotland, and sending them to the house in America, without specifying whether they were on joint account or on commission.

The letters referred to, were, one from Dalgleish and Frame, dated Glasgow, 27th June, 1812, and addressed to Mr. James Thompson, Glasgow, in which they say the goods were printed in consequence of his orders ; and express a hope that he will take the whole contained in the invoice ; or, if not, that he will allow them to go to his house on joint account. The other was a letter addressed to Messrs. Dalgleish and Frame, signed James Thompson, and dated Glasgow, 1st July, 1812, in which he acknowledges the receipt of their letter of the 27th of June, 1812,
p. 338 and says, that as there are a | great many more goods in the invoice than he had ordered, and as he did not wish to take so large a quantity, he would send them on joint account.

The invoice, or rather bill of parcels, is dated Glasgow, 27th of June, 1812, and was headed ' Messrs. R. and J. Thompson and W. Steele bought of Dalgleish and Frame.'

The affidavit of John Frame, taken in Glasgow, was also exhibited, in which he swears that the goods are the joint property of Messrs. R. and J. Thompson and Wm. Steele and of Dalgleish and Frame.

Such was the further proof offered.

In the Frances were two letters from James Thompson to Wm. Steele. The first was dated Glasgow, July 13th, 1812, in which he says ' I annex a list of goods consigned by the Frances. These consignments are the safest and surest trade for us, and it was from this conviction that I allowed of so many consignments.' In the annexed list of consignments, referred to in the foregoing letter, were the goods shipped by Messrs. Dalgleish and Frame. In this letter, he writes on the business of the house, speaks of the consignments generally, recommends that the goods should be promptly sold at the market price, and accounts of sales returned ; but makes no allusion to any interest in the goods of Dalgleish and Frame.

IRVING, *for Appellants*, after stating the facts of the case, and the claim of Robert and James Thompson and William Steele, contended,

That British property shipped on board an American vessel, before a knowledge of the war, was not liable to capture, either under the laws of the United States or the president's instructions to the commanders of privateers. That the commissions issued by the president to the private armed vessels of the United States, only authorized them to seize, 1st. *British* vessels and the property found on board: 2d. All property liable to capture by the laws of war; and that the property, in the present case, did not come under either of these descriptions. | *Acts of congress* p. 339
of June 18th, and June 26th, 1812, *Laws U. S. vol.* 11, *p.* 227 *and* 238. See, also, *the instructions of the president to the private armed vessels of the United States.*

Enemies' property in possession of the nation declaring war, at the time of the declaration, is not liable to seizure as prize of war: it can only be sequestered by municipal regulation. The Court having jurisdiction in cases of this kind, sits as a municipal, not as a prize Court. 1 *Rob.* 238, *The Rebeckah.* 5 *Rob.* 207, *The Boeders Lust.* 2 *Azuni*, 224.

The property, in the present case, is to be considered as committed to the public faith. The circumstances under which it was shipped, and afterwards sailed, were very peculiar. The non-intercourse act and the several acts supplementary thereto, the revocation of the French decrees, the president's proclamation of 2d November, 1810, the letter of the American secretary of state (Mr. Monroe) to Mr. Foster, the British minister, under date of July 26th, 1811, the revocation of the British orders in council, and the assurances of Mr. Russel, the American charge d'affaires in Great Britain, presented a state of things on which the British merchants, and the American merchants in Great Britain, confidently relied for the security of their property shipped, under these circumstances, to the United States.

This doctrine, that the property of an enemy, found in the country at the breaking out of a war, is under the safe-guard of the public faith, is a principle of the common law. In England, property in this situation would not be condemned. Enemy goods which came down the Baltic, and were landed in England before a knowledge of the war, have been there held to be safe. *Magna charta* itself recognizes the principle. By the rule of reciprocity, therefore, protection ought to be extended by the American government to the property now in dispute.

It is said that we have not a standing in Court, that James Thompson is an alien enemy, and that an alien enemy cannot support a claim of this kind. But we | say that, admitting James Thompson to be an alien enemy, p. 340
his agent in this country may have a standing in Court, if the property in question be divested of its hostile character, which we contend is the

case here. 5 *Rob. Nostra Madonna delle Gracie.* 6 *Rob.* 1. *id.* 21, *The Marianne.* 2 *Rob.* 135, *The Packet de Bilboa.*

But if these goods be hostile property, and the Claimants, on that account, have no right to them, still, we contend, the *captors* cannot support their claim: The property of the goods, if not in the Claimants, is in the United States, and liable to seizure under the non-intercourse act of March 1, 1809; which act is neither repealed by nor merged in the act declaring war, nor any other act. *Laws U. S. vol.* 9, *p.* 243. § 5, § 8, and § 18, *of the act.* The 3d sect. of the prize act, (*Laws U. S. vol.* 11, *p.* 239,) requires that all the laws of the United States, then in force, be observed by the owners, officers and crews of privateers. The non-intercourse act was one of the laws of the United States then in force. The second set of instructions to the privateers of the United States, (issued 6th August, 1812,) interdicts the capture of American vessels having on board British goods: They are to be seized by the collectors of the respective ports. The United States have always asserted their prior right to such property. (See the circular letter from the comptroller of the treasury, of October 16th, 1812.) They have chosen to *municipalize* it—to reserve it to themselves. Congress has resisted every attempt to the repeal the non-intercourse. The act of July 13th, 1813, (*Laws U. S. vol.* 12, *p.* 14.) shows that the United States have not relinquished their claim to property situated like that now in dispute. Their relinquishment only goes to such property as should be *condemned* as prize of war.

As to the first instructions of the president, they only authorize the private armed vessels of the United States to capture enemy property on board neutral or hostile vessels, and not that found on board American vessels returning to the United States, flying before the storm of war, and seeking the protection of their country. See the circular letter of Mr. secretary Gallatin, of 26th August, 1812. The second set of instructions, before referred to, prohibit the capture of American vessels
p. 341 returning to the United States with British property shipped | after the repeal of the orders in council, and before the declaration of war was known in England. These instructions were operative as soon as issued, and were the law for all the privateers of the United States. They made a cessation of hostilities as to the property above described; which if thereafter captured by a privateer, would be restored to the owners. The captors would only be relieved from the payment of damages and costs. 2 *Azuni*, 229, 230, 355, 263.—2 *Dallas*, 40. *Bain v. Schr. Speedwell.* —1 *Rob.* 154. *The Mentor.*

We would now, on behalf of the Claimants, move the Court to allow us further proof as to the ownership of the property. We wish to show that the goods are not, in truth, consigned property, but that one moiety belongs to the Claimants. We wish to explain the papers which the

captors have considered as proving the property in question to be hostile. That we have a right to make this explanation, we refer the Court to the following cases. 6 *Rob.* 3.—*id.* 132, *W. and J. Bell's case.*—4 *Rob.* 161. *Maddonna delle Gracie.*—*id.* 21. *The Josephine.*—3 *Rob.* 268. *The Sarah.* —That further proof may be allowed in an appellate Court, see 1 *Rob.* (Amer. Ed.) *p.* 7. *Sir W. Scott and sir J. Nicholl's statement of the general principles of proceeding in the admiralty.*

DEXTER, *contra,*

Said that the motion, on behalf of the Claimants, for further proof, was entirely unexpected—that there was nothing for them to found such a prayer upon—that the claim to the 130 packages was ambiguous, the ground upon which it was made being alternative, viz. *either* that the goods were shipped on joint account, *or* that the Claimants have an equitable lien on them, on account of advances made on the consignment.

That these 130 packages were wholly British property, is clear from the papers exhibited : they were consigned by British merchants to the Claimants, with orders to sell, and remit the proceeds.

The decision as to the residue of the property in dispute, viz. the *third* claimed by James Thompson, depends upon his national character. That this is hostile is evident | from the decision in the case of the Venus p. 342
(8 *Cranch,* 253,) to which decision, and the argument on behalf of the captors in that case, we beg leave to refer the Court.

To return, then, to the 130 packages. It being clear that they were British property, the only question is, whether such property is liable to condemnation, as prize of war.

The case, as stated and argued upon by the captors, is not justified by the facts ; the real state of the case is materially different. The Frances was captured, not in port, but *on the high seas.* She did not enter the port upon the faith of the nation, but was brought in as prize.

The counsel for the Claimants, admitting the goods now in dispute, to be British property, has said that American property similarly situated would not be condemned in England ; and that therefore, by the rule of reciprocity, protection ought to be extended by the American government to these goods. But even the rule of reciprocity, if it were one which this Court could enforce, would not avail the Claimants in the present case ; for the British Government do not themselves respect the rule : They have captured and condemned our vessels sailing towards England, though ignorant of the war.

The declaration of war is expressed in terms as general as possible. The instructions of the president to the privateers of the United States give them a general authority to capture all property liable to capture by the laws of war.

The public faith was not pledged so as to protect this vessel. If it was pledged to repeal the non-intercourse law, there was no pledge that war should not be declared ; and we claim condemnation under the declaration of war.

As to the president's instructions of 26th August, it appears that they were issued only two days previous to the capture of the Frances. The captors, consequently, had no notice of their existence. They sailed
p. 343 with instructions authorizing this capture : and we contend | that the new instructions were no instructions to these captors, until they had received notice of their being in force.

It has been said, on the part of the Appellants, that if their claim is rejected, the United States, and not the captors, will be entitled to the property. We reply that the United States have now abandoned their claim ; so that the property, if condemned, must be condemned to the captors.

HARPER, *for Appellants.*

The reasons on which we ground our prayer for further proof, are the following.

1st. Certain bales of carpeting appear, by the invoice and bill of lading, to be the property of Steele. In the letter of 13th July, 1812, from James Thompson to Steele, they are stated to be a consignment. The further proof which we would offer, in regard to this apparent inconsistency, goes to show that upon these goods, although stated to be consigned to Steele, James Thompson & Co. had made advances to the owners, to the amount of 1000*l.* sterling, which created a lien upon the goods. This lien, we contend, was the property of James Thompson & Co. Again, certain other goods appear, in like manner, by the bill of lading and invoice, to be the property of Steele; but, by the letter, to be the property of Dalgleish and Frame and James Thompson. The further proof we offer here, is, that we were joint owners with Dalgleish and Frame.

It is a general rule of prize law, that further proof shall be allowed on an appeal, where the preparatory evidence was doubtful or ambiguous. The present case, we conceive, comes within this rule.

DEXTER, *contra.*

On this point of further proof, *cited* the two following cases. 6 *Rob.* 24, (Amer. Ed.) *The Marianna*—to show that an equitable lien is no ground of restitution in prize causes—and 5 *Rob.* 196. *The Tobago*, where it is
p. 344 decided that a bottomry bond given in time of peace, gives | no such title to the obligee as will enable him to support a claim for restitution after a declaration of war. He contended that a captor takes *cum onere*, only when the *onus* is visible and direct.

PINKNEY, *same side.*

Further proof, under the circumstances of this case, ought not to be

allowed. The goods were shipped when war was expected. The intention of the shipper was to give a neutral character to the property. James Thompson knew the facts relative to the transaction as well when he made the shipment, as now. He had reason to expect and did expect war: Hence the color given to the transaction. If the Court allows further proof in a case like this, they will hereafter be inundated with fraud and perjury. It is a general rule of the prize Courts, that further proof which goes to contradict the ship's papers, shall not be admitted. If there had been really an American interest in this case, it was James Thompson's duty as well as interest to let it appear upon the ship's papers. The original claim, of the Appellants was stated in the alternative—*either* they had a lien on the goods for money advanced by them through James Thompson, *or* the goods were consigned to them on joint account.

The heading of the invoices was false, by their own admission. A letter appears among the papers in this cause, from Robert Sterling, junr. who had property on board, shipped in the name of Wm. Steele: this letter was evidently written in contemplation of war. James Thompson's letter of 13th July, contains a list of goods *consigned*, in contradistinction to the goods belonging to the firm. The goods in question are among the *consignments*. By James Thompson's letter of 14th July, it appears that he knew of the war. From a second letter of Robert Sterling, junr. dated 15th July, it is evident that he also knew of the war. In contradiction to such documents, further proof ought not to be admitted.

HARPER, *in reply*.

In the cases of the bottomry bond and the lien, cited by the counsel on the opposite side, the possession of the | property was in the captors. p. 345
The lien was a lien without possession, it was only an incumbrance. But here, the thing was in possession of him who had the lien: The property was vested, so far as the lien extended for the advances. Steele was Thompson's agent, and might have retained the goods until the advances were repaid.

Although war was feared, peace was confidently expected. There was no motive for giving a neutral character to the property. No fraud was intended. There was no intention to defeat the non-intercourse law. Besides, an intent, even if it existed, to defeat a municipal law, is no ground for refusing further proof.

The letters referred to by the counsel for the captors, went with the invoices; and the accidental ambiguity which seems to exist in the papers was owing to the hurry occasioned by the endeavor to get the goods first to market, and to obtain the bounty on exportation.

DEXTER. In the cases cited, the property was not more in the belligerent captor, than it was in the present case:—These goods never were in possession of the consignee;—They were captured in the hands

of the shipper:—They were not shipped as the property of James Thompson & Co. but as the property of the Scotch merchants.

IRVING, cited 1 *Rob.* 86. *The Bernon*, on the point of further proof.

Monday, March 7th.

IRVING. As to the national character of James Thompson. It appears, from the testimony in this case, that James Thompson is a native of Scotland, that he came to the United States in 1793, was naturalized in 1797, and, in 1801, returned to Scotland where he continued to reside as a merchant, till some time subsequent to the declaration of war.

Naturalization, under the laws of the United States, confers upon the subject of it all the rights and privileges of a native citizen, excepting that of becoming president of the United States. He has, therefore, the |
p. 346 same right to leave this country and go abroad which a native citizen possesses. The law of England is the same in this respect. When is the hostile character to be fixed upon him? Not until a war breaks out between the two countries, and he continues, notwithstanding, to reside and carry on a hostile trade with the enemy country. 2 *Cranch*, 120, *Murray v. The Charming Betsy*. A citizen, whether native or naturalized, surprised in a foreign country by a war, has a right to a reasonable time to withdraw his effects. 4 *Rob.* 161, 195, *Madonna delle Gracie*. In Mr. *Johnson's* case (1 *Rob.* 17, 12, *The Indian Chief*) his engagements to his creditors were considered by the Court as a sufficient justification of his residence in Great Britain, and his property was restored. On the point of reasonable time to withdraw, see 5 *Rob.* 90, *The Ocean*. 1 *Rob.* 165, 196, *The Hoop*. 4 *Rob.* 191, 232, *The Dree Gebroeders*. *Vattel, B.* 3, *ch.* 4, § 63.

Expectation of peace justifies delay in an enemy country, or explains the *quo animo* of the resident. 5 *Rob.* 60, *The Diana*.

In *Bell v. Gilson*, 1 *Bos. and Pul.* 355, it is decided that the goods of a British subject purchased in an enemy's country after the commencement of hostilities, may, under certain circumstances, be sent to England. This decision, though now over-ruled in that country, in the case of *Potts v. Bell*, 8 *T. R.* 548, has not been over-ruled here.

The liberty to withdraw property in case of war, is expressly recognized by various treaties, which *fix the time* for withdrawing. See, among others, *the treaty of* 1794, *between his Britannic majesty and the United States, art.* 26. But these treaties do not create the principle.

If, then, we allow time to an *enemy* to withdraw his effects, shall we not allow at least the same indulgence to our own citizens?

A cruizer cannot capture for violation of a municipal law. The
p. 347 seizure for a violation of the non-intercourse | act is directed to be by the

collectors; the action for the recovery of the penalties and forfeitures arising under the act is to be *debt*, and the proceedings generally are to be in conformity with the act of 2d March, 1799, to regulate the collection of duties on imports and tonnage. But where a statute gives a particular form of action, that form must be pursued. *Act of congress of March 1st*, 1809, § 8, *and* 18. (*Laws U. S. vol.* 9, *p.* 248, 254.) *Act of March 2d*, 1799, § 67, 68, 69, 88, 91. (*Laws U. S. vol.* 4, *p.* 389, 390, 427, 431. *Bac. Abr. vol.* 4, *p.* 654, *tit. Statute, K.*)

*Saturday, March 12th. Absent....*LIVINGSTON, *J.*

MARSHALL, *Ch. J.* after stating the facts of the case, delivered the opinion of the Court as follows:

The rights of James Thompson depend entirely on his national commercial character; which is decided by the opinion given in the case of the Venus, (8 *Cranch*, 253.)

The sentence of condemnation pronounced in the Circuit Court, as to James Thompson's claim, is affirmed.

The original evidence is very strong to prove that the shipment made by Dalgleish and Frame was entirely a *consignment*. The whole letter of the 13th of July confirms this idea. It is scarcely credible that the property of Dalgleish and Frame would have been placed on the list of consignments without a note upon it, had it been shipped on joint account. The hurry of business will not excuse or account for this omission. The proposition of Dalgleish and Frame is stated to have been made on the 27th of June, and to have been accepted on the 1st of July. The letters of Thompson to Steele are written on the 13th and 17th of July, when this shipment is treated as being altogether a consignment. The hurry could not have been such as to account for a mis-statement of the fact. There is, too, something mysterious in the manner in which the papers, offered as additional proof, reached Mr. Steele. That they should not have been accompanied by a letter, nor bear any marks of coming from abroad, is singular. |

Further proof is not admitted, and the sentence is affirmed. p. 348

*Wednesday, March 16th. Absent....*MARSHALL, *Ch. J.*

WASHINGTON, *J.* as to the opinion of the Court on the question of *lien*, referred to the opinion delivered in the case of *the Frances*, (*Irvin's claim, post.*) which he said was precisely within the principle of the present case.

The Frances.—Boyer, master (Graham's claim).

(8 Cranch, 348) 1814.

Where the affidavits produced on the order for further proof are positive—but their credibility impaired by the non-production of letters mentioned in the affidavits, a second order for further proof will be allowed in the appellate Court.

THIS case like the preceding, was an appeal from the district Court of Rhode Island: and the claim of John Graham, the Appellant, was to certain other goods by the same ship, the Frances, captured and carried into Rhode Island, as stated in the case referred to, by the Yankee privateer.

HARPER, *for Claimant.*

PINKNEY *and* DEXTER, *for the Captors.*

The material facts of the case, and the substance of the argument on both sides, are stated in the following opinion of the Court,[1] delivered *March 12th*, by

MARSHALL, *Ch. J.*

John Graham, a merchant of New York, claimed sundry parcels of goods shipped on board the Frances, as his sole property.

The goods were shipped by William Graham and brothers, merchants of Glasgow, on account and risk of John Graham, merchant, of New
p. 349 York. There are | two bills of lading, each filled up with the name of John Graham. There are also two invoices, each headed with the name of William Graham and brothers as shippers, and stating the goods to be shipped on account and risk of John Graham. The first of these invoices is marked in the margin thus, W. G. ⋈ I. P. and the other thus, [G.]. There were also two lists of goods. The first headed, 'List of goods shipped by the Frances, for Messrs. John Graham & Co. New York.' This list is marked W. G. ⋈ I. P. The other is headed, 'List of goods shipped by the Frances, for Messrs. Peter Graham & Co. Philadelphia.' These goods are accompanied by two letters dated the 15th and 16th of July, signed William Graham and brothers, the first addressed to Messrs. John Graham & Co. and the last to Messrs. Peter Graham & Co. The letter to John Graham & Co. treats of their trade generally, and contains only the following allusion to this shipment: 'You have 'herewith the ship Fanny's accounts, to which refer—also invoice of 'sundry goods per Frances—we hope they may go to a good market. 'We expect you will have about one hundred packages of English goods. 'There will be somewhat more to Philadelphia.'

The letter to Peter Graham & Co. is also a general letter on the subject of their trade. It contains the following passage respecting the shipments by the Frances: 'We have shipped by Frances a few goods 'well selected—we could not get almost any cluster seeds.'

[1] LIVINGSTON, J. was absent when this opinion was delivered.

The Circuit Judge directed the cause to stand for further proof.

It appears from the affidavit of John Graham, that in the month of January, in the year 1809, he entered into a limited partnership with his brothers, William Graham and Peter Graham, who, as well as himself, are naturalized citizens of the United States. The business was to be conducted at New York by himself, under the name of John Graham & Co.—at Philadelphia, by Peter Graham, under the name of Peter Graham & Co.—and at Glasgow, by William Graham, under the name of William Graham and brothers. That, from the commencement of the partnership, he has been in the constant habit of carrying on extensive | business, with the knowledge of his partners, on his private account, p. 350 and also in connexion with others. That the investment and disposal of the funds of the deponent, together with the management of the mercantile concerns of the firms composed as aforesaid, and the commission business, were the principal if not the sole business of William Graham and brothers at Glasgow. That, from the intimate knowledge they possessed of each others affairs, and in consequence of their connexion as brothers, the distinction between his firm and his private character was not always preserved. It was the less attended to, because the affairs of the company and his individual concerns were frequently the subjects of the same letter, and it became the more usual to address him by the style of the firm, because there are several other persons of the same name in New York. He adds, that in making shipments on the sole account of the deponent, William Graham has been in the habit of assorting the whole into invoices of small quantities, calculated to suit the generality of purchasers in the New York market, and also that the goods in any one of the said invoices might be sold entire, or trans-shipped to Philadelphia or any other market, with the original invoice accompanying the same, as such original invoice would inspire more confidence in the buyers. This circumstance occasioned the lists of property shipped by the Frances, and one of them to be addressed to Peter Graham and Co. He swears in the most positive and precise terms, that the property is entirely his own, and was purchased with his private funds in the hands of William Graham.

William Black deposes, that he has been long and intimately acquainted with John Graham, who is a man of fortune and character, and has been in the habit of transacting much of his own business in the said Graham's counting house. That, from his knowledge of the affairs of the said Graham, he verily believes that the said Graham, both before and since the war, has been in the habit of doing business on his private account, and has received many shipments in which neither of his brothers were interested. He has been concerned with the deponent as part owner of vessels in which the deponent believes that neither William nor Peter Graham held any share. |

p. 351 Isaac Belt and David Dunham, merchants of New York, swear to facts similar to those stated by William Black.

Charles Graham, of a different family from the Claimant, swears that in the year 1811, there were, according to the dispensary, six persons of the name of John Graham in New York, one of whom was the deponent's father; and that mistakes were frequently made respecting each other's letters which came through the post-office.

William Hill, principal clerk of William Graham and brothers, deposes to the different concerns and to the nature of the business transacted by William Graham and brothers, as stated in the affidavit of John Graham. That they had under their care ships and vessels in which John Graham alone was interested. That since an early period in the year 1811, the concern of William Graham and brothers have not shipped any goods whatever, for or on account of the said co-partnership, to either of their said establishments, or in any other manner whatsoever. That vessels continued to arrive, particularly the Trident, the Fanny, and the Cuba, to the charge of the said William Graham and brothers, for the account and risk of John Graham, in which ships and cargoes the said co-partnership or the said William Graham had no share or interest whatsoever. The deponent has seen sundry letters from the said John Graham to the said William Graham and brothers, to invest the monies arising from the freight and cargoes of those ships, in goods, in behalf of him, the said John Graham, so soon as the British orders in council should be revoked; and, until then, to place the amount to his private credit in the books of William Graham and brothers, which was done by the deponent as clerk. That this money was invested in the goods shipped by the Frances and other vessels, which were shipped on the sole account of John Graham, and were so entered on the books, by the instructions of William Graham. He states the practice of dividing shipments into small invoices, as is stated in the affidavit of John Graham.

Peter Graham swears that he has not, and never had, any interest
p. 352 in the goods shipped by the Frances. That | John Graham has been in the habit of transacting business on his own account, with the knowledge of his partners, and has frequently consigned his separate goods to Peter Graham & Co.

William N. Steele, clerk of Peter Graham, deposes to the same facts; and founds his belief that Peter Graham had no interest in the goods shipped by the Frances, on his knowledge of the business of the house.

William Graham states in detail, with great explicitness, the circumstances narrated in the affidavits of John Graham and of William Hill, his principal clerk, and avers most solemnly that the goods shipped by the Frances were the sole property of John Graham.

The Court below directed restitution of two thirds of the cargo, as

being the property of John and Peter Graham, and condemned one third, as being the property of William Graham. From this sentence of condemnation John Graham has appealed; and from so much of the sentence as directs a restitution of one third as the property of Peter Graham, the captors have appealed.

It is certainly a rule in prize Courts dictated by good sense, and calculated to promote the purposes of justice, that letters accompanying the cargo, written in good faith, in the prosecution of a fair and honest business, should have great influence in ascertaining the real proprietors of it. The letters on board the Frances are of this description. They are such as would be written if the goods were really the property of the company; but such as could scarcely have been written if the goods were the sole property of John Graham. Had they been his sole property, it must have happened that some expression would have been found in the letters indicating the fact. Men who write carelessly and without design, may not be very explicit; but it rarely happens that they entirely conceal the truth. There will be some allusion to it.

If the goods were the sole property of John Graham, why address a letter to Peter Graham & Co.? The affidavits account rationally enough for making up separate invoices; but addressing a letter to Peter Graham | & Co. at Philadelphia, by a vessel destined for New York, p. 353 has very much the appearance of a shipment destined for the company at that place, and not for John Graham, of New York. The expressions of that letter favor the same idea. 'We have shipped you, by Frances, a few goods well selected.' These cannot well be the goods of John Graham. The language is surely not such as would be used in that state of things. 'We could not get almost any cluster seeds.' These expressions have a necessary reference to some letter of orders from Peter Graham, mentioning cluster seeds among the articles directed to be shipped.

The affidavits produced on the order for further proof, are too positive to be disregarded without considerable reluctance and hesitation. There are, however, certain rules of evidence, the authority of which is admitted in all courts. One of these is, that if a written paper be referred to, which paper is in the power of the party, it ought to be produced. The affidavits of William Graham and of William Hill state expressly that letters had been received from John Graham, directing the disposition of cargoes shipped from America on his own account, and ordering the proceeds to be invested in British manufactures, also on his own account, so soon as the British orders in council should be repealed. Why are not these letters produced? It is impossible not to perceive their necessity. Mr. John Graham must have copied these letters into his letter book. Why has he not furnished some evidence of this fact. His letters must

have been answered by William Graham more explicitly than in that which was found on board the Frances. Why is no one of those letters produced? It is impossible to account for the fact that no one of these letters is an exhibit in the cause. The Court feels itself bound, judging on this evidence according to the rules of law, to consider the goods as the property of the company. But it is urged, on the part of the Claimant, that if permitted to give further proof, he will produce the correspondence and such other proof as will be entirely satisfactory to the Court. Several circumstances exist in this cause to induce the Court to allow still further time for the production of such further evidence as may place the transaction beyond any doubt. The cause is ordered to stand for further proof.

The Frances.—Boyer, master (Dunham and Randolph's claim).

(8 Cranch, 354) 1814.

A case of further proof. Goods, shipped by a British to an American house (partly in conformity with orders, and partly without orders,) who had an option to accept or reject the whole invoice in a limited time, remain the property of the shippers until the election be made to accept them.

THIS is another case of goods by the Frances, captured by the Yankee, and condemned in the Circuit Court of Rhode Island, brought up to this Court on appeal.

Messrs. Dunham and Randolph, merchants of New York, claimed three bales and nineteen boxes of goods shipped by Alexander Thompson of Glasgow, a British subject, and consigned to Dunham and Randolph. The bill of lading is in their names, and the invoice purports to be on their account and risk. A letter from Thompson to Dunham and Randolph, dated Glasgow, 11th July, 1812, after describing the goods, and the labor he had employed in the business, and stating that the goods were sent partly in the Fanny and partly in the Frances, says, 'I have ex-'ceeded in some articles, and have sent you others not ordered.' 'I 'leave it with yourselves to take the whole of the two shipments, or 'none at all, just as you please. If you do not wish them, I will thank 'you to hand the invoices and letters over to Messrs. Falconer & Co. 'I think twenty-four hours will allow you ample opportunity for you 'to make up your minds on this point; and if you do not hand them 'over within that time, I will of course, consider that you take the whole.'

On the 15th of July, Alexander Thompson again wrote to Dunham and Randolph a letter in which he mentions the information that a bill declaring war had passed the house of representatives. He then adds, 'considering the circumstances of the times, I thought it best to inform

'Messrs. Falconer, Jackson & Co. fully of the conditions on which I 'have shipped you the goods by the Fanny and Frances.'

In a letter to Messrs. Falconer, Jackson & Co. of the same date, he explains, in full, the proposition he had made to Dunham and Randolph, and directs how those gentlemen are to act for him, should Dunham and Randolph reject the consignment. |

This property was condemned in the Courts below, and from the p. 355
sentence of condemnation the Claimants appealed to this Court.

PINKNEY, *for the Appellants.*

This is a mere question of fact as to property. Were or were not the goods the property of the enemy? We contend, that they were not. All the documentary evidence shows the property to belong to Dunham and Randolph. The condition mentioned in Thompson's letter of 11th July, was a condition *subsequent.* The property vested in the Claimants, liable to be divested, if rejected by them within twenty-four hours after receiving the letter.

The greater part of the goods, if not the whole, was shipped by order of the Claimants, long before the sailing of the vessel. The delivery to the master of the ship was an execution of the order. The shipper had no longer any control over the property, except, in case of the insolvency of the consignees, in which event he might stop it *in transitu.*

Every circumstance connected with the transaction appears to be perfectly fair; and if the evidence now before the Court is not sufficient to support the claim of the Appellants, it is a case for further proof. The Claimants had accepted the shipment by the Fanny before the capture of the Frances, and thereby rendered certain what was before optional. They thereby bound themselves to take the shipment by the Frances.

HUNTER, *contra.*

The goods in question were not shipped according to order, as appears by Thompson's letter of 11th July. They belonged to the shipper until the consignees had elected to take them; and they could not make their election before the arrival of the Frances.

At whose risk were the goods while at sea? Thompson had no power to impose the risk on the Claimants. If the goods had arrived at Boston, they might have been attached as the property of the shipper. If attached | as the property of the Claimants, they might have said the goods were p. 356
not their property: or if they had been sued as garnishees of Thompson, they might have said they owed him nothing. They were not bound to accept the goods.

If the property, *at law*, belonged to Thompson, *a fortiori* in a case of prize. It is a rule of prize Courts that, in time of war, no future election shall be allowed to change the right of property at sea—*in transitu.*

The question is, in whom is the legal estate? At whose risk were the goods passing at the time of capture? 2 *Rob.* 111, 133. *The Packet de Bilboa.*—1 *Rob.* 90, 107. *The Danckebaar Africaan.*—5 *Rob.* 115, 128. *The Jan Frederick.*—1 *Rob.* 283, 336. *The Vrouw Margaretha.*—4 *Rob.* 21, 25. *The Josephine.*—*id.* 180, 218. *The Aurora.*—*id.* 170, 207. *The Carl Walter.*—6 *Rob.* 337. *The Carolina.*—1 *Rob.* 243, 289. *The Copenhagen.*—These cases all go to prove that, during war, property cannot change *in transitu.*

DEXTER, *same side.*

In this case, there was no contract to change the property. To constitute a contract, the assent of both parties is necessary. The goods were not shipped according to the order of the Claimants, and a condition was annexed. The property never vested in the Claimants: It was only to vest in them on condition that they failed to deliver over the goods to Messrs. Falconer & Co.

PINKNEY, *in reply.*

The further proof which the Claimants would offer, will show that almost all the excess of goods beyond the order, was on board the Fanny. Here was a direct assignment to the Claimants. The goods were delivered to their agent, the master of the vessel. The documents were all sent to the consignees. No change of property *in transitu* was necessary. The property was already vested in the Claimants: and, upon its arrival, they might have asserted their right to it. So far as the goods com-
p. 357 ported with the order, the contract was | certainly executed: There can be no doubt about *those* goods. The Claimants might have maintained trover or replevin for them.

This was not the sort of shipment described by *sir W. Scott,* in the cases cited. Thompson, the shipper, was a naturalized citizen of the United States: This appears in other cases before this Court; and that fact constitutes part of the further proof which we wish to introduce. There was no knowledge of the war, in this case. The transaction was not shaped by the expectation of war. Thompson did not believe that war would take place, and he gives his reasons. The shipment was directed on the 11th of July. Between that and the 15th, the intelligence of the war was received.

*Saturday, March 12th. Absent....*LIVINGSTON, *J.*

MARSHALL, *Ch. J.* after stating the facts of the case, delivered the opinion of the Court as follows.

It has been argued for the Appellants, that, by the invoice and bill of lading, and the true construction of the letter of Alexander Thompson, the property was vested in Dunham and Randolph, liable to be divested by their rejecting the consignment within twenty-four hours after receiv-

ing the letters. That the condition annexed to the transfer, is subsequent, not precedent.

The Court cannot concur in this reasoning. It has been very truly urged for the captors, that to vest this property in Dunham and Randolph, a contract is necessary; and that to form a contract, the consent of two parties is indispensable. In this case, no such contract appears. Had Thompson, in execution of the orders of Dunham and Randolph, consigned to them, unconditionally, such goods as they had directed, the contract would have been complete; and the goods would, on being shipped, have become the property of Dunham and Randolph. But Thompson has not done this. With the goods which were ordered he has consigned other goods, expressly stipulating that Dunham and Randolph shall not take the goods they had ordered, unless they consent to take the whole quantity put on board both vessels. This, then, is a new proposition, on which Dunham and Randolph | are at liberty to p. 358
exercise their discretion. They may accept or reject it; and until they do accept it, the property must remain in Thompson. The sentence of condemnation, therefore, in this case, was warranted by the evidence before the Circuit Court.

But the Claimants pray an order for further proof; and say, that, before the capture of the Frances, the Fanny had arrived, and Dunham and Randolph had consented to take both cargoes.

This application is opposed on the principle that, were the fact even true, as alleged by the Claimants, belligerent property cannot change its character *in transitu*.

Reserving any opinion on the law of the case, until the facts alleged shall be substantiated, if it shall be in the power of the Claimants to substantiate them, the cause is ordered to stand for further proof.

The Frances.—Boyer, master (Kennedy's claim).

(8 Cranch, 358) 1814.

Question of fact as to property.

THIS was likewise a case of goods by the *Frances*, condemned in the Circuit Court of Rhode Island. They were claimed by Duncan Kennedy, an American citizen, who appealed to this Court.

The case was submitted to the Court without argument.

Saturday, March 12th. Absent....LIVINGSTON, *J.*

MARSHALL, *Ch. J.* delivered the opinion of the Court as follows:

Duncan Kennedy, surviving partner of the house of George Stayley & Co. merchants of New York, claims eight boxes of merchandize, part of the cargo of the ship Frances, as his property.

The invoice is headed

'*Glasgow, 8th July*, 1812.

'Messrs. George Stayley & Co.

'Receive from James Smith.'

A letter from James Smith to George Stayley & Co. in speaking of the goods, terms them '*our goods*,' and does not, in any manner, indicate that they are the goods of Stayley & Co. He concludes his letter with saying, 'As it is to be hoped the trade will now open, I shall expect 'your instructions saying what goods are best suited for the market.'

The bill of lading is filled up with the name of George Stayley & Co. '*on account and risk as per invoice.*'

There are several letters from George Stayley, in Glasgow, to his father; but none of them indicate an opinion that the property of the goods was in George Stayley & Co.

The sentence, condemning these goods, must be affirmed.

The Frances.—Boyer, master (French's claim).

(8 Cranch, 359) 1814.

An intention, clearly proved, of a consignor of goods to vest the right of property in the consignee, is not sufficient to effect such a change of property, until the goods are received by the consignee, or some evidence is given of his agreement to take them on his own account: until that time, the goods are at the risk of the shippers; and if they are enemies, the goods, if captured, are good prize. No difference though the consignee were the agent of a third person who had directed him to order the goods, unless it appears that he actually did order them.

This, like the former cases of the *Frances*, was an appeal from the United States' Circuit Court for the Rhode Island district.

William French, the Appellant, a citizen of the United States, claimed fourteen boxes of merchandize shipped on board the Frances by James Auchincloss, of Paisley, in Scotland, to A. and J. Auchincloss of New York, on their account and risk, with orders to remit the proceeds to
p. 360 the shipper for payment. The Claimant | alleged that the goods had been previously ordered by him through A. and J. Auchincloss, to be imported on his account and risk.

Further proof was ordered by the Court below, to consist of the original order for the merchandize, and all the letters and correspondence relating to it, and of all the proofs of property in the Claimant.

Under this order, the Claimant produced a letter dated Baltimore, 20th February, 1812, signed by himself, and addressed to A. and J. Auchincloss, requesting them to order from their friends in Scotland, goods not exceeding in value 1,000*l.* sterling, to be shipped so soon as the orders in council should be revoked.

On the 20th of September, 1812, A. and J. Auchincloss wrote a letter to the Claimant, advising him of the capture of the Frances with the goods, said to be shipped on his account, to their address, and desiring him to take the necessary steps to have his property cleared.

To these letters were added affidavits of the Claimant, tending to prove the property in him, together with an affidavit of Darius Hodson, that he forwarded the above last mentioned letter to the Claimant at Providence, by his request; and that, when he took it from the file, it was a whole sheet directed to the Claimant from New York, by J. Auchincloss, jun.; but that, in order to save postage, he, the deponent, tore off the outside leaf, not thinking, at the time, of its being of any importance.

Upon this proof, the claim was rejected in the Court below, and the property condemned to the captors.

In this Court the cause was argued by JONES for the Appellant, and DEXTER for the captors; and on

*Tuesday, the 15th of March. Absent....*MARSHALL, *Ch. J.*

WASHINGTON, *J.* delivered the following opinion of the Court: |

This is the claim of William French to a part of the cargo of the p. 361
Frances, shipped by James Auchincloss, of Paisley, in Great Britain, to A. and J. Auchincloss, of New York, on their account and risk. By the correspondence between the consignor and consignees, which was exhibited to the Court below, under an order for further proof, it is somewhat doubtful whether these goods were to be sold as the property of the consignor, or of the consignees. In the letter from the former to A. Auchincloss, dated the 17th of July, 1812, he says, 'You will lose no time to 'transmit immediately, on the receipt of the invoice by the Fanny as 'well as by the Frances, to the full amount of the invoices; as thereby, 'and no other way, is your credit and John's to be restored here. Also 'remit, as I have often told you, to clear off your old debt; and, for God's 'sake, let us have no more failing in the family. You will observe that 'the goods per Fanny and Frances are principally bought upon a credit 'of 3, 4 and 5 months—this the consequence of failing.'

In another letter of the same date, from the same to the same, he says, 'By this ship, the Frances, I have shipped you 14 boxes of different kinds 'of goods, which I beg you will lose no time to dispose, as by early remit-'tances you will undoubtedly strengthen your credit.' In another part of this letter he says, 'I beg you will lose no time to remit largely, say '3 or 4,000 pounds. Remember the old cash account with the Paisley 'Banking Company.' These letters, so far as they throw light upon this transaction, intimate very strongly that A. and J. Auchincloss were to dispose of these goods upon their own account, and as the purchasers of

them. But to produce a change of property from the shipper to the consignee, it was essentially necessary that the goods should have been sent in consequence of some contract between the parties, by which the one agreed to sell, and the other to buy. Had the language of these letters been more explicit than it is to prove that the intention of the consignor was to vest the right of property in the consignee, it would not have been sufficient to effect such a change, until the goods were received, or some evidence given of the agreement of the consignee to take them on his own
p. 362 account. No order from A. and J. Auchincloss to the | consignor of this cargo, authorizing the shipment of it, was produced or offered to be produced in the Court below; and this Court, therefore, is warranted in believing that none such was ever given. Indeed, no interest whatever in these goods is asserted to have existed in A. and J. Auchincloss, but the same is claimed by Wm. French, a citizen of the United States, who, under the order for further proof, produced, in support of his claim, a letter from himself to A. and J. Auchincloss, dated the 20th February, 1812, in which he requests them to order from his friends in Scotland, a quantity of goods enumerated in the letter not to exceed 1,000*l.* sterling, to be shipped as soon as the orders in council should be revoked, and adding that he should consider the goods at his risk from the time they should be shipped; also an invoice of these goods sent by A. and J. Auchincloss to Wm. French, together with a letter from them, dated the 20th of September, 1812, advising him of the capture of the Frances with the goods shipped on his account, and recommending it to him to take the necessary steps to vindicate his right to the property. This letter made its appearance in the Court below, with the outer leaf, on which the postmark would have been placed, had there been any, torn off. To do away the suspicion which this circumstance might well excite, the affidavit of Darius Hodson was produced, in which he states that he forwarded this letter to the Claimant, at Providence, having first torn off the outer leaf with a view to lessen the rate of postage.

The affidavit of the Claimant is added, which is fully to the purpose of supporting his interest in these goods, so far as his order to A. and J. Auchincloss can vest such an interest in him. But passing over those observations which might fairly be made upon the mutilated state of the letter from A. and J. Auchincloss to the Claimant, and the suspicious manner in which that circumstance is attempted to be explained, it may be observed that the claim of Wm. French is in no respect stronger than if it had been made by A. and J. Auchincloss. Admit that he wrote to A. and J. Auchincloss the letter of the 20th of February, 1812, and received from them that of the 20th of September, the inquiry still re-
p. 363 mains to be answered, where is the order for this | shipment from A. and J. Auchincloss as the agent of the Claimant?

The truth is, that in whatever light this question is viewed, these goods were at the risk of the shippers until they should be received by the consignee; and, consequently, were, by the capture, made good prize, as property belonging to the enemy.

The Frances.—Boyer, master (Gillespie's claim).

(8 Cranch, 363) 1814.

The commercial domicil of a merchant at the time of the capture of his goods, determines the character of those goods, hostile or neutral.

This, also, was an appeal from the sentence of the Rhode Island Circuit Court condemning certain goods captured on board the *Frances*, by the Yankee privateer.

These goods were shipped by Colin Gillespie, the Claimant, who had been naturalized in the United States, and consigned to Archibald Bryce and Alexander Muirhead, for sale and remittance to the shipper at Glasgow.

To ascertain the national character of the Claimant, further proof was ordered by the Court below, calling upon him to show how long, after his naturalization, he resided in the United States, before he went to Great Britain; how long he had since resided in the United States, at any time or times; how long in Great Britain; what was the nature of his business in the latter country; and in whom the property vested at the time it was shipped.

Upon the production of this further proof, it appeared that the property was vested in the Claimant at the time of its being shipped; that he was a native of Great Britain; that he emigrated to the United States in 1793; was naturalized in 1798; having, in the interim, returned to his native country on mercantile business in 1794 and 1796, and re-visited the United States in 1795 and 1797; that he again returned to his native country in 1799, was there married and re-visited the United | States with his wife, in the same year; that he continued to reside in p. 364
New York until June, 1802, when he once more returned to Great Britain, and resided there until November, 1805, when he came to the United States, (Mrs. Gillespie having died in Scotland) formed a partnership with John Graham, of New York, and returned to Glasgow in the same year, where he carried on the business of the partnership under the firm of Colin Gillespie & Co.; that he remained there until the partnership was dissolved, and until the 2d of July, 1813; on which day he left the enemy's country, and arrived in the United States with his family, in October, 1813; that he kept house at Glasgow, and built a ware-house there, which he still owns, and kept his counting-house therein. He formed a determination to return to the United States, as he deposes, on

being informed of the declaration of war by the United States against Great Britain, which took place on the 18th of June, 1812, and was known in England about the 20th of July following, but was prevented, by his engagements and commercial concerns, from carrying that intention into effect until the period above mentioned, still leaving some of his affairs unarranged.

Upon this evidence, the property was condemned in the Circuit Court; and an appeal was taken, by the Claimant, to this Court, where the cause was argued by JONES, HARPER, and DEXTER, for the Claimant; and PINKNEY for the captors.

JONES, *for the Claimant.*

The goods in question were purchased early in July, 1812, they were shipped on the 14th of that month, at which time the declaration of war was not known in England. It does not appear that the Claimant shipped any other goods than those in question. In less than a year after he had received information of the war, he returned to the United States with his family, thereby giving unequivocal evidence of the *quo animo* of his residence in Great Britain. In such a case, even the property of a neutral would be protected; *a fortiori*, ought the property of one of our own citizens to receive protection. Cases of this kind are analogous to cases
p. 365 of confiscation. If there be any particular period at which | we can consider this property as assuming a hostile character, it must be that, at which it would have been confiscable by the enemy, supposing the party to continue an American citizen. Had that period arrived? Were the circumstances such as would have justified Great Britain in confiscating this property? If not, surely the United States ought not to condemn it. *Vattel, B.* 3, *sec.* 63.

This case may be considered in another point of view, viz: whether the case of a naturalized citizen returning to his native country, and carrying on trade, as in the present case, is distinguishable in its consequences, in the event of war, from that of a *native* citizen going to a foreign country and engaging in trade. We contend that it is not. One authority, and one only, seems to favor the distinction; and that is the case of *La Virginia*, 5 *Rob.* 99. But in that case, it does not appear that the American character of Mr. *Lapierre* was acquired by naturalization. It might and very probably did depend on *domicil* alone. We contend that a person naturalized in this country, is as much a citizen of the United States, to all the intents and purposes of the present case, as a native. The naturalization law of the United States requires of the applicant for the privileges of naturalization, unqualified abjuration of allegiance to his former sovereign. The law of England on the subject goes to an equal extent. Naturalized and native subjects are looked upon as the same, to all legal purposes. 4 *Cranch*, 321. *Dawson's Lessee v. Godfrey.*

A *denizen* may be made such for life or in tail; 'but one cannot be *naturalized* either with limitation, for life or in tail, or upon condition; for that is against the absoluteness, purity and indebility of natural allegiance.' *Co. Lit.* 129, (*a.*) 2 *Domat*, 376.

If, according to the doctrine of perpetual allegiance, on the return of a naturalized citizen to his native country, his former duties return, and his duties to his adopted country still continue, under what contradictory obligations would he be placed. This was *lord Hale's* doctrine, but it is now done away. *Foster's Crown Law*, 185, *sec.* 4. |

It has been decided in England, in the case of *Marryat v. Wilson*, p. 366
1 *Bos. and Pul.* 430, that a natural born subject of that country admitted a citizen of the United States of America, either before or after the declaration of American independence, may be considered as a subject of the United States, so as to entitle him to trade to the East Indies under the 13th article of the treaty of 19th November, 1794.'

HARPER, *same side*,

Asked whether the Court, in the case of the *Rapid*, had decided the question as to the difference between the British acts concerning letters of marque, prizes and prize goods, which authorize the capture of the property of *inhabitants* in hostile countries (and on which the British admiralty decisions are founded,) and the act of congress declaring war, which only gives a right to capture the property of *British subjects*.

JOHNSON, *J.* said the Court had fully considered that point and decided it in the case of the *Rapid*.

PINKNEY, *for the captors*.

We contend that the property even of a *native* American citizen domiciled in an enemy country at the time of the capture of such property, is liable to condemnation as prize of war; and, *a fortiori* the property of a *naturalized* American citizen, a native of the enemy country, under like circumstances; which is the case before the Court, and which will be first considered.

It has been contended on the other side, that a person naturalized in the United States is as much a citizen of this country as a native, and that he continues to be so, though he return to his native country and there engage in trade. It has been argued that, in order to become an American citizen, he must abjure his allegiance to his former government, that, consequently, though he should return to his native country, he can no longer be considered as under the protection of that government: that his new allegiance to the United States continues, and that our government is bound to protect him: that he is therefore to be considered in the | same light as a native citizen, and that his property is equally to be p. 367
protected in case of war.

That a person so abjuring his native allegiance cannot claim protection from his former government, while he continues in the country of his adoption, is admitted; but we contend that if he voluntarily returns within the sphere of his original allegiance, he is as much a subject of his former government as if he had never emigrated; that the reciprocal duties of allegiance and protection, on the respective parts of the subject and the sovereign, are revived: he is no longer a citizen of the United States. The two allegiances are incompatible, we admit; the naturalization law of the United States clearly goes upon this idea; but in case of the party's return to his native country, it is the old allegiance which must prevail, and not the new, as is contended by the Claimant. By his return, he has, in fact, consented to resume his former allegiance: for he must be presumed to have known the laws of his country, and that those laws would impose upon him his old duties in case of his return. He is now, as *sir W. Scott* would call him, a *redintegrated* subject of his native country, and is liable to all his former obligations. He is now bound actively to support the government to which he has returned. In case of war, he may be compelled to take up arms against the country he has adopted; to pay taxes for the support of the war, &c. and this, not by arbitrary power, but of right. These obligations, it will be recollected, we contend are the effect of a *voluntary* return. We do not mean to say that if a naturalized citizen should enter the army of the United States and be captured by the nation to which he formerly belonged, during a war between the two countries, he would, on being carried to his native country as a prisoner, incur those obligations. But in the case now before the Court, the return of Gillespie, the Claimant, to England, was entirely voluntary. Without regard, therefore, to the question of domicil, Gillespie was, according to the doctrine for which we have been contending, politically an enemy of the United States, at the time of the capture of the Frances. If he was not an enemy, I should be glad to know who can be considered as such. If *he* is not *hostis*, who has every hostile duty upon him, I am at a loss to know who is. |

p. 368 If the war had been sudden, humanity might plead in behalf of the Claimant. But in this case, there was no surprize. War had been threatening for a long time previous to its actual declaration. No indulgence, therefore, on this ground, can be claimed.

The counsel for the Claimant has cited lord *Coke* in support of his doctrine of naturalization, but does not seem to have considered that, according to that author, a British subject can never become a citizen of any other country.

The case of *Marryat v. Wilson* has also been cited. That case is perhaps entitled to some consideration; but even there, the Court had, at first, decided against Collet, and it was only upon the request of the

American minister (Mr. King) that they consented to re-consider the case, when they finally decided in his favor.

2. If Gillespie was politically an enemy, at the time of the capture, the doctrine of commercial domicil is wholly immaterial in the present case. But as the Court may not view the subject in the same light as we do, a few remarks on the latter point may not be unnecessary.

We lay it down then, as an indisputed position, that the character of captured goods is decided by the commercial domicil of the owner at the time of capture. And we contend that Gillespie had a commercial domicil in Great Britain, at the time of the capture of the goods in question. It does not appear that he had, in any manner, put himself in motion—*in itinere*, to return before the capture. All the evidence showing his intention to return, arose *after* that event. A hostile character, therefore, attached to the property, if not to the owner.

This is not a case of withdrawing funds : it is a case of trade originating before the war, and continued after the war. Besides, the rule of withdrawal applies only to cases where the domicil of the party is not in the enemy country, though his trade is carried on and his property situated there. See *Coopman's* case, cited in the | *Vigilantia*, 1 *Rob.* 12, 14. *Escott's* p. 369
case, cited in the *Hoop*, 1 *Rob.* 170, 201. *The Madonna delle Gracie*, 4 *Rob.* 161, 195.

It has been said, that at the time of the shipment of the goods in question, the war was not known in England, and that it would be a case of great hardship, under such circumstances, to subject this property to condemnation. But want of notice, in cases like this, is an excuse not known to the law of nations. See *Whitehill's* case (referred to in the case of the *Hoop*, 1 *Rob.* 170, 201)—Whitehill was a British subject—had been at St. Eustatius only two days and had no knowledge of the war—yet his property was condemned.

As to the fact, that public treaties frequently allow a particular time for the respective subjects of both parties to withdraw in case of war, it may be observed, that this is only providing against the exercise of a right which the contracting parties would otherwise have had. But these mutual concessions do not alter the nature or effect of the domicil.

At all events, Gillespie ought to have put himself in motion to return to the United States, immediately upon knowledge of the war. This he does not appear to have done : and, according to *sir W. Scott*, nothing but the actual force of the government is a sufficient excuse for the neglect. But no such excuse has been offered.

On either of the grounds, therefore, which have been taken in this argument, we conceive that the property in controversy must be condemned.

HARPER, *in reply*.

It is the nature of the trade, not the place of residence, which determines the hostile or neutral character of the trader.

We must still insist, that a naturalized citizen of the United States is a citizen to every intent, the right to be president of the United States only excepted, which exception but proves the general rule.

p. 370 It is said, on the part of the captors, that a naturalized | American citizen ceases to be such, when he returns to his native country. Suppose, then, while absent in his native country, a descent should be cast upon him in this—would he be considered by our Courts as an alien, so as to deprive him of the estate so cast upon him ? Again, suppose, in case of war between the two countries, he should enlist himself under the banners of our enemy, and be found in arms against us, should we not consider him as a traitor, and treat him accordingly ? If he chooses to take such double responsibilities upon himself, it is his business to reconcile them : *we* can only consider him as an American citizen.

We might admit, perhaps, that by a return to his native country in time of war, he must be considered as having abandoned his rights as a citizen of the United States, in relation to trade : still, however, he could not throw off his duties. But Gillespie returned in time of peace. He therefore did not assume new duties incompatible with those he owed to this country. He assumed only that temporary allegiance to the government of Great Britain, which every other stranger in that country owed. Upon the breaking out of the war, perhaps new duties might arise inconsistent with his duties as an American citizen. Yet, in that case, a reasonable time ought to be allowed him to remove ; and if he made every reasonable exertion to return to the United States, and especially if he did actually return in less than a year after being informed of the existence of the war, which is the fact, he must be considered as having retained his American character.

The domicil of the owner at the time of capture, is not the criterion whereby to determine the character of the property captured, in all cases. If it be so *generally*, this case ought to be an exception. Gillespie was lawfully in England at the breaking out of the war : he cannot be presumed to have known that war would take place ; it is impossible that he should have known it ; such a presumption is unreasonable. *Whitehill's* case has been cited on the other side ; but the counsel for the captors is mistaken as to the facts of that case. Whitehill knew of the war, and that St. Eustatius was hostile, at the time he went there ; which essentially distinguishes it from the case now before the Court. |

p. 371 PINKNEY, referred to the history of the times, to show that Whitehill had no knowledge of the war when he went to St. Eustatius.

HARPER. If Whitehill did not know that war had actually been

declared, he knew that measures had been taken which may be considered as equivalent to a declaration. The capture took place in February. He knew that letters of marque had been issued in December preceding, and that a long irritation had existed between the two governments. He knew, also, that the trade in which he was engaged, was a trade frowned upon by his own government. In the present case, the circumstances were entirely different. 5 *Rob.* 220, 247.

*Saturday, March 12th. Absent....*LIVINGSTON, J.

MARSHALL, *Ch. J.* delivered the opinion of the Court as follows:

Colin Gillespie, a naturalized American citizen residing in Glasgow, claimed sundry goods, shipped on his own account, as his property. This claim depends entirely on his national character, and is decided in the case of the *Venus*.

The sentence of the Circuit Court, condemning the property of the Claimant, is affirmed.

The Sally.—Porter, master.

(8 Cranch, 382) 1814.

Property engaged in an illicit intercourse with the enemy, to be condemned to the captors, not to the U. States. A municipal forfeiture under the laws of the United States is absorbed in the more general operation of the law of war. The prize act of 26th June, 1812, operates as a grant from the U. States to the captors, of all property rightfully captured by commissioned privateers, as prize of war.

THIS was an appeal from the decree of the Circuit Court for the district of Massachusetts.

The facts of the case were as follow:

The brig *Sally*, John Porter, master, was captured by the privateer Jefferson, John Kehew, commander, July 7, 1812, as prize, and sent into the port of Salem, in the district of Massachusetts, for adjudication. The Sally, at the time of her capture, had on board a coaster's manifest, and a permission from the collector of the port of *Passamaquoddy*, dated *July 7*, 1812, to proceed to *Boston*. From the manifest, her cargo purported to be *one box* of hones, and *one box* of furs. She had on board, also, about *four thousand bushels of salt*.

The Sally was licensed and enrolled for the coasting trade, at New London, *June* 6, 1812, upon the oath of *John Patterson*, of the city of *New York*, who swore that he was the agent of *James Mavor*, of *New York*, the owner.

Patterson was on board at the time of capture. Upon the return of the monition in the District Court, *Patterson* claimed the brig for *Mavor*, and *Edward Monroe* claimed the salt for himself and *Lemuel P. Grosvenor* of *Boston*.

The affidavit of claim of Monroe did not state where the salt was taken on board, nor for what reason it was not mentioned in the manifest.

Patterson, Porter, the master, and the crew, upon the preparatory examinations, swore that the salt was put on board the brig at *Robinstown* and *Eastport,* in the district of Maine.

Among the papers found on board the Sally, was a permission to land her cargo of 60 tons of cordage and 50 bolts of duck, from the deputy collector of the port of Passamaquoddy, dated *June* 20, 1812. |

p. 383 There was also found on board, a letter to Messrs. *Monroe* and *Grosvenor, Boston,* dated Eastport, *July* 7, 1812, signed '*L. P. G.*' covering a bill of lading of the salt. In this letter it is said, 'I am sorry to say that no clearance of the salt can be obtained on board the brig; I have however despatched her, with a clearance of two small packages of John Brewer, consigned *to us,* and leave you to manage; it will, at least, be as well as the other goods sent—and I am hourly expecting a *seizure to pay for sundry prizes taken from St. Andrews.*' Again—'A protection can be had, for any vessel bound here with provisions, from the English admiral, &c.' St. Andrews is a small town in New Brunswick, a province belonging to Great Britain.

In the manifest of the Sally, the two small packages above mentioned are consigned to *Monroe* and *Grosvenor,* Boston.

The captors produced witnesses in the District Court, who proved that the Sally discharged at *St. Andrews,* her cargo of cordage, after the 1*st July,* 1812, and took in there the salt.

The vessel and cargo were condemned, in the District Court, to the captors, and an appeal entered by the Claimants. In the Circuit Court the decree was affirmed, and Monroe and Grosvenor appealed to this Court.

A claim was interposed by the United States as for a forfeiture under the non-intercourse act.

On the above statement (and upon the argument in the case of the *Rapid,* 8 Cranch, 155,)the case was submitted.

Tuesday, March 15*th. Absent*....MARSHALL, *Ch. J.*

STORY, *J.* delivered the opinion of the Court.

This case cannot be distinguished from that of the *Rapid.* It was there decided that property engaged in an illicit intercourse with the
p. 384 enemy, is liable to | confiscation as prize of war, and the only remaining question now before us, is, to whom it shall be condemned—to the captors, or to the United States.

By the general law of prize, property engaged in an illegal intercourse with the enemy, is deemed enemy property. It is of no consequence whether it belong to an ally or to a citizen; the illegal traffic stamps it

with the hostile character, and attaches to it all the penal consequences of enemy ownership. In conformity with this rule, it has been solemnly adjudged, by the same course of decisions which has established the illegality of the intercourse, that the property engaged therein must be condemned as prize to the captors, and not to the crown. This principle has been fully recognized by sir *William Scott*, in the *Nelly*, 1 *Rob.* 219; and, indeed, seems never to have admitted a serious doubt.

But a claim is interposed by the United States, claiming a priority of right to the property in question, upon the ground of an antecedent forfeiture to the United States, by a violation of the non-intercourse act, (of March 1, 1809, vol. 9, p. 246, § 5) the goods having been put on board at a British port, with an intent to import the same into the United States.

We are all of opinion that this claim ought not to prevail. The municipal forfeiture under the non-intercourse act, was absorbed in the more general operation of the law of war. The property of an enemy seems hardly to be within the purview of mere municipal regulations; but is confiscable under the *jus gentium*.

But even if the doctrine were otherwise, which we do not admit, we are all satisfied that the prize act of 26th June, 1812, ch. 107, operates as a grant from the United States of all property rightfully captured by commissioned privateers, as prize of war. The language of the 4th, 6th and 14th sections is decisive.

The decree of the Circuit Court, condemning the vessel and cargo to the captors, is affirmed.

The Euphrates.

(8 Cranch, 385) 1814.

Further proof, inconsistent with that already in the case, refused on the part of the Claimant.

THIS was an appeal from the sentence of the United States' Circuit Court for the district of Rhode Island.

The merchandize, in this case, was libelled in the District Court of Rhode Island, as belonging to subjects of Great Britain. The capture was stated in the libel to have been made on or about the 23d day of August, 1812. No libel was filed against the vessel.

In June term, 1813, a claim was interposed on behalf of the United States, on the ground that these goods were imported in violation of the non-intercourse laws.

In May, 1813, Matthias Bruen interposed a claim to certain merchandize on board of the Euphrates, alleging that he *is* the sole legal owner thereof.

The papers connected with this shipment were as follow :

1. An invoice, dated Mansfield, 30th June, 1812, purporting the goods therein described to be shipped at Liverpool, under insurance, consigned to Mr. Henry Watkinson, New York, or, in case of his absence, to Mr. John French Ellis of that place, for sale, *on account of the manufacturers, Siddons and Johnston,* who were British subjects.

2. A bill of lading by which it appeared that the goods were shipped at Liverpool, on the 7th of July, 1812, on board of the Euphrates, to be delivered to Henry Watkinson, he paying freight, &c.

3. A letter from Siddons and Johnston, dated Mansfield, 30th June, 1812, in which they say, ' We have, this day, consigned to you for sale ' on our account, sixteen trunks,' &c. (which are the goods claimed.) ' We hope we shall shortly hear of sales being made by you, to advantage : ' we hope they will at least net us what they are invoiced at, covering
p. 386 ' all expenses.' | ' We shall leave this shipment to your discretion to ' make the best and most advantageous returns you can.'

There being no proof whatever, on the part of the Claimant, and he not appearing to have any interest whatever, by any of the papers on board, the goods were condemned both in the District and Circuit Courts, and the Claimants adjudged to pay costs to the Libellants.

From this decree there was an appeal, on the part of Mr. Bruen, to this Court.

HARPER, *for the captors,*

Stated that this was merely a question of further proof offered on the part of the Claimants. The captors, he said, relied upon the documentary evidence produced in the cause. This evidence he stated to the Court, and contended that it was too plain and consistent to justify the Court in allowing the Claimant further proof.

STOCKTON, *contra,*

Stated that the object of the further proof now offered, was to show that Watkinson was agent for a manufacturing house in England ; that the Claimant ordered certain goods through this agent ; that, on the passage of the non-intercourse act, he directed the goods not to be shipped, &c.

DAGGETT, *same side,*

Observed that it had been generally supposed that the rules of the English Courts respecting further proof, would not apply to the Courts of the United States, but that parties would have the benefit of new evidence in this Court, in prize cases as well as in other cases in admiralty ; and that the parties in the present case had acted on that opinion.

The case was then submitted. |

*Tuesday, March 15th. Absent....*MARSHALL, *Ch. J.* p. 387

LIVINGSTON, *J.* delivered the opinion of the Court.

The Court does not understand the counsel for the Appellant as contending that there was any error in the sentence of the Circuit Court, or that any other than sentence of condemnation could have been pronounced there. It was, indeed, a very clear case, on the proceedings before that Court. But it is supposed that Mr. Bruen is entitled to an order for further proof; and that the facts which he will be able to make out, if an opportunity be afforded him, will entitle him to a restitution of the property.

Without rejecting the application on account of its being made at so late a period, the Court has looked into the proof which it is proposed to bring forward, and, on comparing it with the proof already in the cause, we are of opinion that it is totally incompetent to make out a title in the Appellant. There is not the least reason to believe that these goods were shipped in consequence of any previous orders given to Mr. Watkinson by merchants in this country, and transmitted by him to Messrs. Siddons and Johnston. On the contrary, whatever orders may have been sent to those gentlemen by Mr. Watkinson, it is most manifest that they did not, in this case, act upon them; for the invoice and letter accompanying the shipment announce, in terms not to be misunderstood, that these goods were sent to the United States for the exclusive account and at the sole risk of the British manufacturers.

It has not escaped the notice of the Court, that not one of the gentlemen who are alleged to have given orders for these goods on Messrs. Siddons and Johnston, through Mr. Watkinson, and who all reside in the United States, appears as a Claimant for any part of them. Instead of this, we find them, or several of them, assigning their interest in this adventure, whatever it may be, to the Claimant; but for what value does not appear; and every instrument takes care to express that the property is to be recovered at the risk and expense of Mr. Bruen. Thus is a total stranger to the shipment, and a mere volunteer who may not have paid | a single cent for his title, made a party Claimant: a mode of p. 388
proceeding novel at least, and well calculated to awaken suspicions not at all favorable to his pretensions. Whether a title to goods obtained in this way, would, under any circumstances, be sustained by a Court of prize, we will not say; but it is, in our opinion, sufficient reason, of itself, to refuse the party any opportunity to make further proof. Mr. Bruen not only does not pretend that he owned any part of these goods at or previous to the time of capture, but merely that he was the legal owner at the time of filing his claim; and upon the affidavits now laid before the Court, as the ground of an order for further proof, it appears that this legal title was acquired in the way already mentioned; that

is, by a number of persons assigning to him a *chose in action*, which they must have considered of no value, or, at any rate, not worth pursuing. Such conduct can entitle the party to no favor or indulgence whatever. Upon the whole, the Court is as well satisfied with the decree of the Circuit Court, as it is with the total insufficiency of the evidence in reserve to produce any alteration in it.

The application, therefore, for further proof is rejected, and the sentence of the Circuit Court affirmed with costs.

The Mary.—Stafford, master.

(8 Cranch, 388) 1814.

A case of withdrawing funds, and further proof.

THIS was an appeal from the sentence of the United States' Circuit Court for the district of Rhode Island.

The following is a statement of the facts connected with the case.

General Garret Visscher, *alias* Fisher, a native of the state of New York, entered into the British army before the revolution, and having obtained the rank of lieutenant general, died in England, rich, intestate, and without issue, leaving a large number of relatives citizens of the state of New York, residing at or near Albany. Mr. | Nanning J. Visscher, one of the number, went to England, and met with no obstruction in obtaining letters of administration, and possessing himself of the estate to the amount of 150,000*l.* sterling. In August, 1812, he set himself in motion to return to the United States, and did return, leaving Mr. Harman Visger, his agent, in England, to transmit the property to the United States, for the use of those concerned. Harman Visger, finding that he could not remit to this country in the course of exchange, without great loss, invested a large sum in goods of the growth and manufacture of Great Britain, and to transmit a part of them to the United States, hired, on freight, the brig Mary, an American registered vessel belonging to J. B. Kennedy of South Carolina. The brig being at the port of London, was sent to Bristol, in July, 1812, to take on board this cargo. She arrived off that place, according to her log-book, on the 23d of the same month. On the 30th, an embargo was laid in England, on account of the war; and, on the 1st of August, the custom house mark of *stop* was put on the Mary. Having been detained, some time, by the embargo, she sailed from Bristol, with the cargo on board, on or about the 15th day of August, 1812, bound to New York. Soon after she put to sea, she sprung a leak, and, on the 21st day of August, 1812, put into Waterford, in Ireland, to repair. Requiring a complete repair, her cargo was re-landed and stored in the King's store-houses, and she was repaired by the freighter, at an expense of 1700*l.* sterling; to secure which he

p. 389

took from the captain a bottomry bond. On the 7th of April, 1813, the Mary sailed from Waterford; having cleared out for Newport, in Rhode Island, in order to avoid the blockade which was supposed to exist as to New York. Before sailing, a British license of the description usually denominated a *Sidmouth* license, was obtained for her from the king's privy council, by Mullet, Evans & Co. subjects of the king of Great Britain. The license ran in their name, and purported to be a renewal of a similar license granted on the 8th of July, 1812. She had no license from the American government. On the 23d of April, 1813, she was captured on the high seas, by the American privateer Paul Jones, and sent into Newport with a single prize master on board, the captain being left in command of the vessel and in possession of the ship's papers. On her arrival at Newport, she was libelled | by the captors, as being p. 390
and bearing enemy property, and also by the United States for a breach of the non-intercourse acts. The Claimants made application to the secretary of the treasury, and he, under the act of January 2, 1813, 'directing the secretary of the treasury to remit fines, forfeitures and penalties, in certain cases,' remitted the forfeitures and penalties accruing to the United States.

The brig's papers were regular, proving her to be an American registered vessel.

The invoices and bill of lading stated her cargo to be shipped by Harman Visger, on account of the heirs of general Fisher, citizens of the United States, and consigned to Peter Remsen & Co. New York, to account with Nanning J. Visscher, administrator, or with Barent Bleecker, Esq. of Albany, agent for the heirs. The invoices were all dated 13th August, 1812. The bill of lading had no date; but by its reference to the invoices, the shippers have given it the semblance of the same date.

War was declared by the United States against Great Britain on the 18th of June, 1812, and the fact was known in London on the 26th of July, following; the news was stated on that day in the public gazette in London, to have been received in Liverpool on the 18th of the same month.

The Claimant was in England when the Mary sailed, and for some time after, and made no attempt to countermand the voyage. Insurance was obtained in England, freight paid, as well as license and brokerage money, and the exportation duties, before the Mary sailed.

The brig and cargo were acquitted in the District Court, but condemned in the Circuit Court; and from the decree of the latter the Claimants appealed.

STOCKTON, *for the Claimants.*

It is contended, on the part of the Appellants, |

p. 391 1. That the cargo in question having been purchased by citizens of the United States, either before the war was actually declared, or before that event was known in England, and with the sole intent of transferring American funds in England to the United States, the shipment was no act of illegal trading with the enemy, and no cause of forfeiture.

2. That the act of congress of 2d January, 1813, authorizes this importation, and, by legal construction, amounts to a license for this vessel and cargo.

3. That the circumstance of the vessel's sailing with a Sidmouth license, is no cause of forfeiture.

4. That the capture by the privateer was altogether unwarranted by its commission, and expressly against the instructions of the President of the United States; and therefore that the property ought to be restored with damages and costs.

As to the first point, the withdrawing of funds, we contend that a person found in a foreign country at the time of the breaking out of a war between that country and his own, has a right to do every thing necessary to enable him to return to his own country with his effects. This doctrine is supported by weighty authorities, and is founded on principles of reason and justice. It is, besides, an act of sound policy in a nation to permit its own citizens to withdraw their funds from the hostile country; it is taking from the enemy's means of carrying on the war and adding to its own. According to the old rule on this subject, the withdrawing of funds from the enemy's country was a matter of *right*; but the modern rule of the Court of Admiralty has determined it to be a matter of *favor* merely. If it be a matter of favor, we conceive it is such a favor as both reason and policy would direct, in a case like this, to be granted. See 4 *Rob.* 161, 195. *The Madonna delle Gracie.*—*Chitty's law of nations*, 19, 20.—4 *Rob.* 191, 232. *The Dree Gebroeders.*—1 *Bos. & Pul.* 345. *Bell & al. v. Gilson.*—1 *Rob.* 184, 220. *The Betty Cathcart.*

2. As to the act of the 2d January, 1813, (*laws U. S. vol.* 11, *p.* 341.)

p. 392 This act amounts to a license from the | American government. The remission of the forfeitures incurred by a violation of the non-intercourse laws, is to be considered as legalizing voyages made under circumstances like those of the present case. The act ought to be liberally construed. It cannot be supposed that the United States meant to remit the penalties accruing to them for the violation of the non-intercourse laws, in order to benefit the privateersmen:—The remission was intended exclusively for the benefit of the owners; against whose claim the legislature supposed the non-intercourse law to be the only bar.

Again, the act of 2d January, must have been known in Ireland long before the Mary sailed from Waterford for the United States. She

may therefore be considered as having sailed from that port under the faith of this act, as she had commenced her voyage from Bristol between the periods specified therein.

The act of 13th July, 1813, relinquishing the claims of the United States, &c. does not favor the claim of the captors, inasmuch as it relinquishes only the property of *British subjects*, not captured in violation of the instructions of the 28th August, 1812; whereas the property in the present case, belonged to Americans.

The Mary sailed from Bristol, or, at all events, from London, which is to be considered as the *terminus a quo* of the voyage, in consequence of the repeal of the British orders in council; and is therefore to be considered as embraced in the president's instruction to privateers, of 28th August, 1812.

3. The Sidmouth license is no cause of condemnation, inasmuch as the original licence was obtained before the war was known in England, and the second was merely a renewal of the first; the British government, conceiving themselves bound, in honor and good faith, to renew it.

There is no analogy between the present case and that of the *Julia*, decided yesterday. In that case, the license was granted, *flagrante bello*, in order to neutralize belligerent property. But here, the granting of the license was only an act of justice, which the British government conceived themselves bound to perform. |

The act of congress of *July 6th*, 1812, (*Laws U. S. vol.* 11, *p.* 302, § 6) p. 393
allows passports to be given for the safe transportation of any ship or other property belonging to British subjects, and then in the United States. This is just what the British government have done in the case of the Mary. The granting of the license was merely a reciprocity of good offices on their part.

But admitting this to be a case of sailing under the flag and pass of the enemy, still the vessel only, and not the cargo, would be liable to condemnation. As to this distinction between the ship and goods sailing under the enemy's flag, see *Chitty's Law of Nations*, *p.* 58. 5 *Rob.* 2, *The Vrow Elizabeth.*

4. This capture was illegal; being altogether unwarranted by the commission of the privateer, and directly in the face of the president's instruction of 28th August, 1812. This instruction prohibits the capture of 'vessels belonging to citizens of the United States coming from British 'ports to the United States laden with British merchandize, in conse-'quence of the alleged repeal of the British orders in council.' These were the precise circumstances of the vessel in question. The capture was therefore illegal.

That the president had a right to issue the instruction under consideration, cannot admit of doubt. By virtue of his office, he is com-

mander in chief of the army and navy of the United States; and, as such, has, in time of war, the whole public armed force of the nation under his control. The privateers of the United States constitute a part of that public armed force. The president was therefore authorized to issue this instruction. 2 *Azuni*, 355.

From the preceding considerations, we trust the Court will feel itself justified in reversing the sentence of the Circuit Court.

J. WOODWARD, *contra*.

If the character of the Mary was, *prima facie*, belligerent, she must be
p. 394 condemned. No latent equities | can save her. That such was her character, appears clearly from the examination *in preparatorio*: and a vessel must be acquitted or condemned generally, according as her character appears upon that examination. The license was for a *British or American* cargo. The presumption is, that it was *British*. It was certainly British *fabric*. No American orders had been given for the goods. The whole appeared as British property, and at the risk of British subjects. If a vessel sails under such circumstances, she sails at her peril. 6 *Rob.* 24, *The Marianna*. 5 *Rob.* 194, *The Tobago*. 6 *Rob.* 134.

But admitting, for argument's sake, that the property is, as the Claimants contend, *American* property, still the transaction now under consideration was a withdrawing of funds from the enemy's territory after a full knowledge of the war, without the license of the American government; and therefore subjected the property so withdrawn, to capture and condemnation as prize of war.

The property in question was certainly British long after the knowledge of the war in England; and the purchase of it by an American citizen in the territory of the enemy was an illicit trade, which is, of itself, cause of condemnation. That the property was British for a considerable time after the war was known in England, appears from the dates of the invoices. They are all dated 13th August, 1812; from which circumstance (there being no bills of parcels) it is to be inferred that the purchase of the goods was made on that day; whereas the war was known in England, at all events, on the 26th of July preceding, and is stated to have been known in Liverpool on the 18th.

We contend, however, that this property was British, not only until the 13th of August, the time of the purchase, but that it is, at this day, strictly British property under color of an American name. |
p. 395 It does not appear from the record, that the Mary sailed from London to Bristol with a view to the prosecution of the voyage to the United States. But if she did, there was an opportunity for countermanding the voyage after it was known that war had been declared; and such countermand ought to have been given. If it might have been, and was not, the doctrine of *putting in motion* does not apply to the present case.

The Claimants were clearly *in delicto*, and no presumption can be made in their favor.

This voyage was in violation of the non-intercourse laws of the United States ; and on that ground, also, the property is liable to condemnation.

With regard to trading with the enemy, we contend that not only the purchase of hostile goods in the enemy country, but also the payment, in that country, of freight, license and brokerage money, and of the exportation duties, amount to a trading with the enemy ; and that every trading with the enemy is illegal. 1 *Rob.* 165, 196, *The Hoop. The Juffrow Margaretha*, cited in the same case, *p.* 181, *note*, (*Amr. Ed.*) 4 *Rob.* 191, 232, *The Dree Gebroeders.* Several cases have been thought to favor an opposite doctrine ; but the case now under consideration does not, we conceive, come within the principle of any one of them.

The first is the case of the *Packet de Bilboa*, 2 *Rob.* 111, 133. But here, the vessel sailed before the war. The Mary, on the contrary, sailed with full knowledge of the war.

The next case is that of *the Abby*, 5 *Rob.* 251. The same distinction exists here, as in the last mentioned case.

The case of *Bell v. Gilson*, 1 *Bos. and Pul.* 345, has been over-ruled in the case of *Potts v. Bell and al.* 8 *T. R.* 548.

As to the license, it does not appear that any was granted on the 8th of July. The recital of such an one in the subsequent license, is no evidence. The license in question, therefore, although it purports to be a renewal of a former one, is a license *de novo*, obtained with a full knowledge of the war ; and is therefore cause of condemnation. |

PINKNEY, *in reply*. p. 396

This is neither a case of trade with the enemy, nor of domicil. Visscher had not acquired a British character by either of these means.

It is not a case of *trading* within the opinion of this Court in the case of the *Rapid*. Visscher, the present Claimant, was not domiciled in England. He returned to the United States almost immediately upon hearing of the war. He arrived long before the cargo. The transaction commenced and the goods in question were purchased before the war was or could have been known in England. No criminality can possibly be attached to the transaction ; and therefore it cannot be a ground of forfeiture. This is the language of the English decisions on this subject.

It is admitted, that if this enterprize had not been undertaken before knowledge of the war, and if some material part of it had not been actually carried into effect—if it had been entirely a new undertaking, and not with the view of withdrawing funds, it would have been a case within the rule of the law of nations, which prohibits trade with an enemy. But where the goods have been purchased before the war, as here, the case neither comes within that rule, nor within the decisions of the English

Court of admiralty. Sir *W. Scott* admits that such goods may be withdrawn. 5 *Rob.* 141, *The Juffrow Catharina.*

But if the Court should be of opinion that this case comes within the general rule prohibiting trade with the enemy, still it will be recollected that that rule admits of relaxation under peculiar circumstances; and we conceive that the circumstances of the present case, if of any, will justify such relaxation. The putting into Waterford cannot, with any reason, be urged against us. That was an act of necessity, and was no discontinuance of the voyage. No new trading with the enemy took place there.

As to the Sydmouth license: It has already been shown that the original license was obtained on the 8th of July, a considerable time before
p. 397 information of the | war reached England. However criminal, therefore, the obtaining such a license might have been in time of known war, in a time of supposed peace it was perfectly justifiable and innocent: it was also absolutely necessary in the present case; the adventure could not have proceeded without a license. The British government was, in fact, bound to give it, by the universal custom of nations. Every nation is under a similar obligation. Our own government has authorized the president to grant such licenses.

But it has been said, that though the obtaining of the first license may be justified in this manner, yet the second, having been procured after knowledge of the war, will not admit of the same justification. Little need be added to what has already been said on this point. The second license was merely a renewal of the first: they are both, indeed, to be considered, but one license. The first having been granted, the second was required, under the circumstances of this case, by the law of nations; or, if not, it was, at any rate, required by good faith. So the British government thought, and so they acted. This case is widely different from those of the *Aurora* and the *Julia.*

With regard to the president's instruction of 28th August, we contend that the Mary comes within both the letter and spirit of that instruction. Her national character is clearly shown by her register and other documents: she is proved to be owned by J. B. Kennedy, of South Carolina: and it is clear that she sailed on the faith of the repeal of the orders in council.

The power of the president to issue instructions to the privateers of the United States, has already been considered. Congress has given him a two-fold power over this part of the armed force of the nation. He is authorized to grant and to revoke their commissions. But *omne majus continet in se minus:* he may therefore grant with limitation, and he may revoke in part. In issuing the instructions in question, he has done nothing more than he had full power and authority to do.

*Tuesday, March 15th. Absent....*MARSHALL, *Ch. J.*

The Court made the following order :

It is ordered that the Claimant have leave to make further proof, by affidavits, as to the following points : p. 398

1. As to his own citizenship.

2. As to the names of the heirs of general Fisher who are interested in the property, the places of their residence, and their national character.

3. As to the time when Mr. Nanning J. Visscher went to England ; the objects which he had in view in going thither ; how long he resided there ; when the cargo claimed by him was purchased ; and when he returned to the United States. And,

4. As to the instructions which the *Paul Jones* had on board at the time of the capture of the Mary ; and particularly, whether the instructions of the president of the 28th August, 1812, had been delivered to the captain, or had come to the knowledge of the captain at the time of the capture ; or whether the *Paul Jones* had been in port after the 28th of August, 1812, and before the capture.

It is further ordered, that the captors be also at liberty to make further proof as to these several matters.

The Frances.—Boyer, master (Irvin's claim).

(8 Cranch, 418) 1814.

No lien upon enemy's property, by way of pledge for the payment of purchase money, or otherwise, is sufficient to defeat the rights of the captors, in a prize Court, unless in very peculiar cases where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties.

Where goods are sent upon the account & risk of the shipper, the delivery to the master is a delivery to him as agent of the shipper, not of the consignee ; and it is competent to the consignor, at any time before actual delivery to the consignee, to countermand it, and thus to prevent the consignee's lien from attaching.

THIS was an appeal from the sentence of the Circuit Court of Rhode Island, condemning certain British goods captured on board the Frances. These goods were claimed by Thomas Irvin, a domiciled merchant of the United States, on the ground of *lien*.

IRVING, *for Appellant.*

PINKNEY, *for Captors.*

*Tuesday, March 15th. Absent....*MARSHALL, *Ch. J.*

WASHINGTON, *J.* delivered the opinion of the Court as follows :

Thomas Irvin is a merchant of New York, and claims certain packages of merchandize consigned to him by Robertson and Hastie, and also three boxes of merchandize consigned to him by Pott and M'Millan. The consignors were British subjects, residing in Great Britain at the

time that these goods were shipped, which, according to the terms of the bills of lading, were on account and risk of the shippers.

It is not pretended that the real ownership in these goods was not vested in the consignors, enemies of the United States; but the Claimant founds his pretensions on a lien created on the goods consigned by Robertson and Hastie, in consequence of an advance made to the shippers,
p. 419 in consideration of the consignment, by his | agent in Glasgow; and on the goods shipped by Pott and M'Millan, in virtue of a general balance of account due to him as their factor. To establish these claims in point of fact, an order for further proof is asked for, and the question is, whether, if proved, the claim can, in point of law, be sustained?

The doctrine of *liens* seems to depend chiefly upon the rules of jurisprudence established in different countries. There is no doubt but that, agreeably to the principles of the common law of England, a factor has a lien upon the goods of his principal in his possession, for the balance of account due to him; and so has a consignee for advances made by him to the consignor. The consignor or owner cannot maintain an action against his factor, to recover the property so placed in his possession, without first paying or tendering what is thus due to the factor. But this doctrine is unknown in prize Courts, unless in very peculiar cases, where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties. Such is the case of freight upon enemies' goods seized in the vessel of a friend, which is always decreed to the owner of the vessel. *Abbott on Shipping*, 184. It is, to use the words of sir *W. Scott*, 'an interest directly and visibly residing in the substance of the thing itself.' The possession of the property is actually in the owner of the ship, of which, by the general mercantile law of all nations, he cannot be deprived until the freight due for the carriage of it is paid. He has, in fact, a kind of property in the goods by force of this general law, which a prize Court ought to respect and does respect. On the one hand, the captor, by stepping into the shoes of the enemy owner of the goods, is personally benefited by the labor of a friend, and ought, in justice, to make him the proper compensation: and on the other, the shipowner, by not having carried the goods to the place of their destination, and this, in consequence of an act of the captor, would be totally without remedy to recover his freight against the owner of the goods.

But in cases of liens created by the mere private contract of individuals, depending upon the different laws of different countries, the difficulties which an examination of such claims would impose upon the captors,
p. 420 and | even upon the prize Courts, in deciding upon them, and the door which such a doctrine would open to collusion between the enemy owners of the property and neutral Claimants, have excluded such cases from

the consideration of those Courts. In the case of the *Tobago*, 5 *Rob.* 196, where an attempt was made by a British subject, to set up a bottomry interest on an enemy's ship, sir *W. Scott* observed, that no precedents to sanction such a claim could be produced: and he very properly concluded, that this was strong evidence that it had not been the practice of the Court to consider such bonds as property entitled to its protection. And it seemed to be conceded, that, upon the same principle, the captor could not entitle himself to the advantage of such liens, existing in an enemy, upon neutral property. From this it appears that the doctrine of the prize Courts upon this subject, works against as well as in favor of captors. The case of the *Marianna* in 6 *Rob.* 24, avoids all the objections made to the application of the case of the *Tobago* to the present. It is precisely in point.

The principal strength of the argument in favor of the Claimant in this case, seemed to be rested upon the position, that the consignor in this case could not have countermanded the consignment after delivery of the goods to the master of the vessel; and hence it was inferred that the captor had no right to intercept the passage of the property to the consignee. This doctrine would be well founded, if the goods had been sent to the Claimant upon his account and risk, except in the case of insolvency. But when goods are sent upon the account and risk of the shipper, the delivery to the master is a delivery to him as agent of the shipper, not of the consignee; and it is competent to the consignor, at any time before actual delivery to the consignee, to countermand it, and thus to prevent his lien from attaching. Upon the whole, the Court is of opinion that, upon the reason of the case, as well as upon authority, this claim cannot be supported, and that the sentence of the Court below must be affirmed with costs.

LIVINGSTON, *J.* I differ in opinion from the majority of the Court. Irvin had a lien on the goods, apparent on the face of the papers. I have no difficulty in condemning the property subject to that lien; but I cannot assent to an unqualified condemnation.

The Thomas Gibbons.—Rockwell, master.

(8 Cranch, 421) 1814.

Under the 8th section of the prize act of June 26th, 1812, the president had full authority to issue the instruction of 28th August, 1812. The commissions of the privateers of the U. States may be qualified and restrained by the instructions of the president. A shipment made, even after a knowledge of the war, is to be considered as having been made in consequence of the repeal of the orders in council, if made within so early a period thereafter as would leave a reasonable presumption that the knowledge of that repeal would induce a suspension of hostilities on the part of the U. States. By the mere act of illicit intercourse the property of a citizen is not divested ipso facto: it is only

liable to be condemned as enemy property, or as adhering to the enemy, if rightfully captured during the voyage.

The president's instruction of 28th August 1812, was meant to protect all British merchandize on board an American ship, without any exception on account of British proprietary interest.

THIS was an appeal from the decree of the Circuit Court for the district of Georgia.

The ship *Thomas Gibbons* sailed from Liverpool for Savannah, on the 16th of August, 1812, was captured on the 12th of October following, on the high seas, off Tybee light house, and, the same day, brought into the port of Savannah as prize to the privateer Atas.

The ship and cargo were under the protection of a special license, dated 21st July, 1812, and conceived in the usual terms of the document usually denominated the *Sidmouth license*, except that, in this instance, the protection was extended to the return voyage back to Liverpool, there to discharge the cargo, and receive freight, if it should be found not to be allowable for the vessel and cargo to enter the ports of the United States.

The clearance from Liverpool, 13th August, 1812, mentioned the ship as being released, in consequence of her license, from an embargo laid on American vessels.

The cargo, shipped at Liverpool by sundry British merchants, was consigned to sundry commercial houses at Savannah, and was claimed by the respective consignees; by some, in their own behalf, and by others, in behalf of their correspondents in the interior.

From the evidence introduced into the cause, it appeared that part of the goods, although expressed to be on account and risk of the consignees, was shipped without previous orders or authority: that some of them were shipped under general orders (transmitted in time of peace) to ship goods: others, under particular orders given during the operation of the orders in council and the non-intercourse act; such as, to ship 'when the trade opened,' 'at a proper season,' 'as soon as it was legal to ship to the United States,' &c. and lastly, that some of them were shipped with an understanding that they were to become the property of the *citizen consignee upon arriving* at the port of destination. |

p. 422 The commission of the *Atas* was granted on the 24th of September, 1812, and was accompanied by a copy of the president's instruction to privateers, of the 28th of August, 1812, by which the public and private armed vessels of the United States are directed not to interrupt 'any 'vessels belonging to citizens of the United States coming from British 'ports to the United States laden with British merchandize, in conse-'quence of the alleged repeal of the British orders in council.'

JONES, *for the captors*,

Contended that the ship and cargo were enemy property.

I. Constructively so, by the maritime law of nations, according to which law the hostile character is impressed.

1. By being placed, by the enemy's pass or license, *infra præsidium hostis*; and by the *employment and course of traffic*. 1 *Rob.* 10, 11, *The Vigilantia.*

2. By direct trading with the enemy, *flagrante bello.*

II. Actually so, with regard to a great proportion of the cargo, according to the principles of municipal law, as recognized and acted upon by prize Courts, in administering the maritime law of nations; according to which,

1. Goods shipped without previous orders or authority, although expressed to be on account and risk of the consignee, continue the property and at the risk of the *enemy shipper*, until accepted by the *citizen consignee.*

2. General orders (transmitted in time of peace) to ship goods, are, *ipso facto*, superseded, if war intervene and render the act *unlawful* as well as *dangerous.*

3. Particular orders (given during the operation of the orders in council and the non-intercourse act) to ship 'when the trade opened,' or 'at proper seasons,' or 'as soon as it was legal to ship to the United | States,' could not authorize a shipment, merely upon the conditional p. 423
revocation of the orders in council, whilst the American non-intercourse act continued in force: *a fortiori* if war should supervene.

4. The proprietary interest in goods shipped with an understanding that they are to become the property of the *citizen consignee, upon arriving* at the port of destination, continues in the *enemy shipper* until arrival and delivery, without regard to the terms in which the consignment is ostensibly made. 2 *Rob.* 111, *The Packet de Bilboa.*

That, therefore, goods captured *in itinere*, under either of the foregoing predicaments, were to be treated as the property and at the risk of the shipper, and as partaking of his national character.

The principal question, he said, which would now be agitated was, whether the instruction of the president of the United States to American privateers, of 28th August, 1812, extended to the case now under consideration. He contended that it did not: or if it did, that it could not legally avoid the capture, nor in any manner affect the rights of the captors, *quoad* the prize in question, but could only be enforced (as originally intended) by the exercise of executive discretion and authority over the *commission* of the privateer. That, according to the decision in the case of the Sally, *that the prize act operates as a grant from the United States to the captors*, the president could not deprive them of their rights under that act. That the power of the president to instruct must be limited by the rights so granted to the captors. That the authority with which he was invested by congress, was only given him to regulate the *conduct* of our privateersmen, and to prevent abuses—not to limit

their rights already vested. That he had no general authority to limit the rights of war, as was clear from the passage of particular acts of congress investing him with the respective powers of removing British subjects, of giving licenses to depart, &c. which would have been wholly unnecessary had he possessed a general power over these matters. That the position contended for, was further supported by the terms employed in the third section of the prize act, in which the owners, &c. of privateers
p. 424 are required to give bond | to the United States that they will observe 'the instructions which shall be given them *according to law*, for the *regulation of their conduct:*' also by the letter of the secretary of state (Mr. Monroe) to Mr. Russell, of August 31st, 1812, written under the eye of the president, in which the secretary says, that it was not in the power of the president to control the privateers, except by an indiscriminate revocation of their commissions. But,

2. That, admitting the power of the president to issue the instruction under consideration, the present case was not embraced thereby. That the property in question, having been shipped after a full knowledge of the war, could not be considered as shipped in consequence of the alleged repeal of the orders in council. That the only time in which the shipments contemplated by the instruction, could be made, was that which intervened between the repeal of the orders in council and the knowledge of the declaration of war; after which it was unreasonable to calculate on the safety of property shipped for the United States. That the ship, also, was not within the description of vessels intended by the instruction to be exempted from capture, because she was engaged in an illicit intercourse with the enemy, under an enemy passport issued after the knowledge of the war in England, and was therefore *quasi* enemy property. That, at all events, the property intended to be protected, by the instruction from capture, was *American* property, and not *British*, and therefore that, as to the latter, the capture was certainly rightful.

HARPER, *contra*.

It has been said, on the part of the captors, that the president had no authority to issue the instruction of 28th August, either on general principles, or under the prize act. We contend that his authority to issue it, may be established on either of these grounds.

1. On general principles. The president, as commander in chief of the army and navy of the United States, has, in time of war, the whole public armed force of the nation under his control. The privateers of
p. 425 the United States constitute a part of the public | armed force: this appears from their commissions, without which they would be pirates. On general principles, therefore, the president was authorized to issue the instruction in question.

2. By the 8th section of the prize act, the president is authorized

to establish and order suitable instructions for the better governing and directing the conduct of the privateers of the United States. Now this governing and directing ' their conduct, we conceive, may be applied as well to the designation of the objects of hostility as to the mode of attack, &c. It is applicable, in our opinion, to their whole conduct.

But it is contended, that the present case is not embraced in the instruction. It is said that the ship did not sail in consequence of the repeal of the orders in council. What, then, we would ask, was the motive for sailing at the particular time this vessel sailed ? What could have induced the master to sail after knowledge of the war, but a confidence that the repeal of the orders in council would have put a period to hostilities ? It is well known that such a confidence did exist among the merchants in England generally, and that it continued until it was ascertained in that country that the repeal of the orders had not produced the expected effect. The act of congress of 2d January, 1813, remitting certain fines, forfeitures, &c. has fixed upon the 15th of September as the period when it was known in England that this effect had not been produced. This vessel sailed on the 16th of August preceding. We insist, therefore, that notwithstanding the existence of hostilities was known in England at the time the Thomas Gibbons sailed, yet she sailed in consequence of the repeal of the orders in council.

The expression in Mr. Monroe's letter of 31st August, was probably accidental—certainly incidental, and not a particular object of the letter.

The expression, *British merchandize*, in the instruction of 28th August, was not intended to designate the *right* of property, but the *kind of goods*. It was the policy of Government to protect British as well as American | property shipped under the particular circumstances p. 426
mentioned in the instruction.

PINKNEY, *on the same side.*

The president cannot coerce the privateers of the United States to do what he pleases, but he may *restrain* them, as he thinks proper.

It has been said that the license under which this vessel sailed, was issued after knowledge of the war in England. This must be a mistake :— it is dated on the 21st of July, 1812, when the war was not known in England ; and it is to be presumed that it was issued at the time it bears date. Being issued, therefore, before knowledge of the war, it does not give a hostile character to the vessel.

HARPER. The property is vested in the captors only when *legally taken*, it is vested *sub modo.*

STORY, *J.* That is the rule as laid down in the opinion of the Court delivered this morning in the case of the *Sally :* The prize act vests only property lawfully captured.

JONES, *in reply.*

The captors may be punished, if guilty; but the captured property must vest in them notwithstanding. The instruction applies only to American vessels: but the license, we still contend, gave the vessel in question a hostile character.

Where the instruction speaks of British merchandize, the meaning is, British merchandize belonging to *American citizens*. This construction is consistent with all the acts of congress on the subject, especially the act of 2d January, remitting forfeitures, &c. It is consistent also with Mr. Russell's declarations to the British merchants. *See 2d vol. of reports of committees, p.* 30.

Wednesday, March 16th.

Absent MARSHALL, *Ch. J. and* JOHNSON, *J.*

STORY, *J.* delivered the opinion of the Court. |

p. 427 The ship *Thomas Gibbons,* laden with a cargo of British manufactures, on account of British and American merchants, sailed from Liverpool, in Great Britain, on the 16th August, 1812, bound for Savannah, in Georgia, and was captured on the 12th of the ensuing October, on the high seas, off Tybee light-house, by the private armed vessel *Atas,* Thomas M. Newhall, commander, and, on the same day brought into Savannah as prize of war. The ship sailed from Liverpool, under the protection of a special license, dated the 21st of July 1812, granted by lord Sidmouth, by order of the privy council, whereby the ship and cargo were protected from British capture, not only on the voyage to the United States, but also on the return voyage to Liverpool, in case the master should not be permitted to land the cargo in the United States; and the master was further allowed, in case of return, to receive his freight, and proceed in ballast to any port not blockaded.

The commission of the Atas was granted on the 24th of September, 1812, accompanied by a copy of the president's instruction of the 28th of August, 1812.

A libel was filed in the District Court of Georgia, upon which regular proceedings were had against the ship, as prize of war. The respondents interposed their claims and the district attorney also interposed a claim in behalf of the United States. At the hearing, the district Court dismissed the libel of the captors, and upon appeal, the decree was affirmed in the Circuit Court.

The principal question which has been moved at bar, is, whether the capture of the ship was lawful: and that depends upon the authority of the president to issue that instruction, and upon the true construction of it, if rightfully issued.

As to the authority of the president, we do not think it necessary

to consider how far he would be entitled, in his character of commander in chief of the army and navy of the United States, independent of any statute provision, to issue instructions for the government and direction of privateers. That question would deserve grave consideration; and we should not be disposed to entertain the discussion of it, unless it become unavoidable. In the | case at bar, no decision on the point is p. 428
necessary; because we are all of opinion that, under the eighth section of the prize act of 1812, ch. 107, the president had full authority to issue the instruction of the 28th of August. That section provides, that the president shall be authorized 'to establish and order suitable instructions for the better governing and directing the conduct' of private armed vessels commissioned under the act, their officers and crews. The language of this provision is very general, and in our opinion it is entitled to a liberal construction, both upon the manifest intent of the legislature, and the ground of public policy.

It has been argued, that privateers acquire by their commissions, a general right of capture under the prize acts, which it is not in the president's power to remove or restrain, while the commission is in force; that therefore his right to issue instructions must be construed as subordinate to the general authority derived from the commission; and that, in this view, his instructions should extend only to the internal organization, discipline and conduct of privateers.

We cannot, on mature deliberation, yield assent to this argument. It is very clear that the president has, under the prize act, power to grant, annul and revoke, at his pleasure, the commissions of privateers; and by the act declaring war, he is authorized to issue the commission in such form as he shall deem fit. The right of capture is entirely derived from the law: It is not an absolute, vested right which cannot be taken away or modified by law: It is a limited right, which is subject to all the restraints which the legislature has imposed, and is to be exercised in the manner which its wisdom has prescribed. The commission, therefore, is to be taken in its general terms, with reference to the laws under which it emanates, and as containing within itself all the qualifications and restrictions which the acts giving it existence have prescribed. In this view, the commission is qualified and restrained by the power of the president to issue instructions. The privateer takes it subject to such power, and contracts to act in obedience to all the instructions which the president may lawfully promulgate.

Public policy, also, would confirm this construction. | It has been the p. 429
great object of every maritime nation to restrain and regulate the conduct of its privateers: They are watched with great anxiety and vigilance, because they may often involve the nation, by irregularities of conduct, in serious controversies, not only with public enemies, but

also with neutrals and allies. If a power did not exist to restrain their operations in war, the public faith might be violated, cartels and flags of truce might be disregarded, and endless embarrassments arise in the negotiations with foreign powers. Considerations of this weight and importance are not lightly to be disregarded; and when the language of the act is so broad and comprehensive, we should not feel at liberty to narrow or weaken its force by a construction not pressed by the letter, or the spirit, or the policy of the clause. On the whole, we are all of opinion that the instruction of the president of the 28th of August, is within the authority delegated to him by the prize act.

But it is argued, that, admitting its legal validity, this instruction cannot protect the ship and cargo from capture as prize of war, because the cargo was shipped after a full knowledge of the war, and not 'in consequence of the alleged repeal of the British orders in council.'

We are of a different opinion. We think that a shipment made even after a knowledge of the war, may well be deemed to have been made in consequence of the repeal of the orders in council, if made within so early a period as would leave a reasonable presumption that the knowledge of that repeal would induce a suspension of hostilities, on the part of the United States. Congress have evidently acted upon this principle; and have themselves fixed the time, (the 15th of September, 1812,) before which, shipments might be reasonably made upon the faith of that presumption. *Act of 2d January* 1813, *ch.* 149. We are not inclined to hold a less liberal construction in favor of the acts of individuals proceeding from a confidence in the avowed intentions of the government.

It is further argued, that the ship was not within the description of vessels intended by the instruction to be exempted from capture, because she was engaged in an illicit intercourse with the enemy, under an enemy
p. 430 passport, and therefore was *quasi* enemy property. We | cannot assent to this argument. The vessels exempted from capture are 'vessels belonging to citizens of the United States, coming from British ports to the United States.' The ship, in this case, was duly documented as an American, was coming to the United States, and from a British port. How can it be possible to bring a case more perfectly within the terms of the description? The argument proceeds upon the supposition that by the mere act of illicit intercourse, the property of an American citizen becomes divested *ipso facto*; but, in point of law, this is not the operation of the rule. The property is only liable to be condemned as enemy property, or as adhering to the enemy, if rightfully captured during the voyage. But it has never been supposed that the documentary character of the ship itself, or the character of the owner, was completely changed for every other purpose. It is sufficient, however, in our opinion, that no such distinction as that assumed in the argument,

is to be found in the instruction itself; and we therefore hold the case within the natural and ordinary import of the language.

It is further argued, that, at all events, the property intended to be protected by the instruction from capture, was American property, and not British property; and therefore that, as to the latter, the capture was rightful. This is a question of some difficulty; but, on full consideration, a majority of the Court are of opinion that the instruction meant to protect all British merchandize on board an American ship, without any exception on account of British proprietary interest. It was supposed that British as well as American merchants might, upon the repeal of the orders in council, be induced to make shipments, upon the faith that such repeal would suspend the further operations of hostilities. The government meant to reserve to themselves the ultimate disposal of such property, in order that they might restore or condemn it, as public policy or the national interests might require. This construction is supported and confirmed by the act of congress, of 13th July, 1813, ch. 10, which, after relinquishing to the captors all the right and title of the United States, to the property of British subjects, captured on the high seas and shipped from British ports since the declaration of war, expressly excepts such property as had been captured in violation | of p. 431
the president's instruction of the 28th of August, 1812. In giving this construction, therefore, we are satisfied that we conform to the import of the language of the instruction, and do not contravene any policy avowed by the government itself.

On the whole, we are of opinion that the decree of the Circuit Court, dismissing the libel of the captors, ought to be affirmed, and that the cause should be remanded to the Circuit Court for further proceedings as between the United States and the Claimants.

The St. Lawrence.—Webb, master.

(8 Cranch, 434) 1814.

A vessel sailing to an enemy's country after knowledge of the war and taken bringing from that country a cargo consisting chiefly of enemy goods is liable to confiscation as prize of war. Suppression of papers, where it appears to have been intentional and fraudulent, and attended with other suspicious circumstances, is good cause for refusing further proof. But where the suppression appears to be owing to accident or mistake and no other suspicious circumstances appear in the case—further proof may be allowed.

THIS was an appeal from the sentence of the United States Circuit Court for the district of New Hampshire. |

The material facts of the case were as follow: p. 435

The ship *St. Lawrence*, Silas Webb master, was captured, on the 20th of June 1813, by the private armed vessel *America*, and, with her

cargo, libelled as prize, in the District Court of New Hampshire. On the proceedings which were had there, it appeared that the St. Lawrence, owned by Robert Dickey of New York, and Hugh Thompson of Baltimore, arrived at Liverpool from Sweden in April 1813, with a cargo of iron and deals. In the month of May 1813, the agent of Dickey and Thomson entered into a contract for the sale of the St. Lawrence, with the house of Ogden, Richards and Selden of Liverpool, the contract to be ratified or disaffirmed by Dickey and Thompson, and the bill of sale to be executed by them, in case of affirmance, to Andrew Ogden and James Heard of New York, or either of them. On the 5th of May 1813, a license was granted by the privy council of Great Britain to Thomas White of London, and others, permitting them to export, direct to the United States, an enumerated cargo in the St. Lawrence, provided she cleared out before the last day of that month. On the 30th of May 1813, she sailed from Liverpool for the United States, with the cargo specified in the license. Mr. Alexander M'Gregor and his family were passengers on board.

Upon the return of the monition in the District Court, Andrew Ogden interposed a claim, in behalf of himself and M'Gregor, to the ship and part of the cargo. He also claimed another part of the cargo as his sole property. He likewise interposed a claim in favor of Selah Strong and Son —of John Whitten—of the firm of Howard, Phelps & Co.—of Abraham and George Smedes—of Peter and Ebenezer Irving & Co.—of Henry Van Wart—of Irving and Smith—of Jabez Harrison—of Hugh R. Toler—and of Thomas C. Butler. This claim was an affidavit of Mr. Ogden, in which he swore that he had not a full knowledge of the concerns of all the persons for whom he claimed, but verily and fully believed that many of the said goods on board the St. Lawrence were sent in payment of debts due, previous to the war, to several of the persons for whom he claimed. This claim was filed on the 17th of August, 1813.|

p. 436 William Penniman of Baltimore, also interposed a claim for five chests of merchandize, which he swore were purchased for him by John Barnet of London, prior to the war, with funds which he had in England eighteen months before the declaration of war, and in pursuance of orders given by him nine months previous to that event. He also swore that he had at Baltimore, the original invoice of the purchase of said goods, and other documentary evidence to prove the aforesaid fact.

There was also a claim of the master for two cases and five trusses of merchandize, and six bolts of russia duck.

In none of these claims was there a designation of the marks or numbers of the casks, bales, or cases which belonged to the different parties for whom the property was claimed.

The master, in answer to the 12th standing interrogatory, said, that for the names of the respective laders, he referred to the bills of lading.

That the goods were mostly, if not all, consigned 'to order.' That the goods were to be delivered to order, at such place as the owners or consignees should appoint; but that he did not know what interest any of the consignees or the shipper might have in the goods.

In answer to the 16th interrogatory, the captain stated that his letter bags, two in number, had been taken possession of, and sent to the custom house: and that, as to any letter he had, directed to the consignees or owners, he had done what he had a right to do; and that all his other papers had been forcibly taken away.

By Mr. M'Gregor's answer to the 9th interrogatory, it appeared that he was interested one half part in the ship; that his sole object in becoming interested in the ship was that of returning to the United States; that he also owned one half of the copperas and of the earthen ware on board, shipped by Ogden, Richards and Selden, and, as he believed, one half of the coal, but that, as to the last article, he was not positive, no invoices of said goods having been delivered to the deponent. |

In relation to the vessel, Mr. M'Gregor deposed, that the only docu- p. 437
ment relative to the sale of the ship, he believed to be a letter to the former owners from their agent, requesting them to make a bill of sale transferring said ship to Andrew Ogden and James Heard, or either of them, which he gave to Andrew Ogden.

It appeared further, from the examination of Mr. M'Gregor, that he was born in Scotland, was naturalized in the United States in 1795, had lived, the last seven years, in Liverpool, and was returning in the St. Lawrence, with his family, to the United States.

The goods claimed by Ogden as his sole property were shipped by the house of Ogden, Richards and Selden. The two gentlemen last named resided at Liverpool.

The District Court condemned the St. Lawrence and all the cargo, except the parts claimed by M'Gregor and the master. Both parties appealed from this decree to the Circuit Court, where the ship and whole cargo were condemned. From this decree the Claimants appealed to the Supreme Court, where the cause was argued by IRVING and WEBSTER for the Claimants, and PITMAN for the captors.

IRVING, *for all the Claimants except M'Gregor and Penniman.*

It is contended, on the part of the Claimants generally,

1. That the ship St. Lawrence, being an American vessel, owned and navigated wholly by citizens of the United States, and being on her return to the United States, with a cargo owned wholly by American citizens, could not legally be subject to capture by American cruizers.

2. That the character of an American citizen, whether native or naturalized, is not rendered hostile by his residence in a hostile country, if, within a reasonable time after the declaration of war, he withdraws with

his funds from the hostile country and returns to his own : and that he has a right so to withdraw.|

p. 438 3. That a citizen of the United States, not resident in the enemy country, has also a right, after the declaration of war, to withdraw his funds, within a reasonable time, from that country.

4. That if the Courts below were not satisfied that the property claimed was, *bona fide*, property of American citizens, fairly purchased and shipped, the said Courts ought to have let the Claimants into further proof fully to establish that fact ; and, as they refused so to do, that the Claimants are entitled, in this Court, to the same privilege.

The argument will be confined to this last point.

It will probably be urged, on the part of the captors, that the secreting of papers by the master is good ground for refusing us further proof. We contend, that as the master was only the agent of the Claimants to navigate the ship, his act is not sufficient to justify the Court in such refusal. On this point the Court is referred to the following authorities. 1 *Rob.* 100, 119, *The Concordia.—id.* 109, 129, *The Hoop, De Vries, master.—id.* 86, 102, *The Bernon.—2 Rob.* 296, 362, *The Polly.—Chitty's Law of Nations, App.* 303.—2 *Rob.* 87, 104, *The Rising Sun.* The last case goes also to show that a claim may be made by an agent : and that too, without clearly distinguishing the rights of each particular Claimant. See also, *Doug.* 614, *Le Caux v. Eden.*

WEBSTER, for *M'Gregor* and *Penniman*—several Claimants.

1. M'Gregor claims half the ship and part of the cargo.

We contend that a distinction is to be taken between an American citizen, domiciled in England at the breaking out of the war, withdrawing his funds, and an American citizen who goes to England after the declaration of war, for the same purpose. That the former, whether a native or naturalized citizen, has a right (and perhaps it is his duty) to return to the United States with his effects. If he has no such right, why should the law of nations have provided a reasonable time for removing in case

p. 439 of war ? This rule of the law of nations | has been founded upon the necessity of the case, and upon the hardship which would attend the want of such a rule. A citizen of one country may lawfully go to any other country, in time of peace, and take up his residence there ; and it would be very hard if he must suffer by the sudden and unexpected breaking out of a war—an event over which he had no control. A neutral would be permitted to withdraw his funds in such a case ; and if we should allow the privilege to neutrals, why should we deny it to our own citizens ? 1 *Rob.* 1, *The Vigilantia.* 1 *Bos. and Pul.* 355, *Bell v. Gilson.*

The case of *Escott*, cited in *the Hoop*, 1 *Rob.* 165, 196, may perhaps be thought to make against our claim. But the cases are not alike. In that case, Escott *sent* for his property : here, M'Gregor came with his.

A character gained by residence, is lost by non-residence. When M'Gregor ceased to reside in England, his character, if hostile before, no longer continued hostile. That it was not his intention to continue his residence in England, is clearly evidenced by his actual return to the United States with his family.

With regard to his half of the ship, we contend that if he had a right to return, he had a right to use the means necessary for that purpose—he had a right to purchase a ship for the conveyance of himself and his family. So if it was lawful for him to withdraw his funds, he might lawfully invest those funds in merchandize, if he could not otherwise withdraw them. 4 *Rob.* 161, 195, *The Madonna delle Gracie.* 3 *Rob.* 17, 12, *The Indian Chief.* 5 *Rob.* 248, *The President.* 5 *Rob.* 84, 90, *The Ocean.* 5 *Rob.* 60, *The Diana.*

2. As to Penniman's claim, we shall, at present, merely ask the Court to allow us further proof.

PITMAN, *contra*, contended,

1. That there was no legal evidence that the cargo belonged to the Claimants, as claimed.

2. That from the origin and character of the voyage, and suppression of papers, concealed enemy interests were to be presumed; that, therefore, all right to further | proof was forfeited, and that condemnation of the p. 440
whole, as enemy's property, must ensue.

3. That the ship, at the time of capture, belonged to Dickey and Thompson, and was liable to condemnation on the ground of having gone to Liverpool in April, 1813, with a cargo of iron and deals, as well as from the circumstances of the voyage upon which she was captured.

4. That the ship and cargo, whether belonging to citizens or enemies, being taken in trade with the enemy, were clothed with a hostile character, and therefore liable to condemnation.

Some other points were also touched upon in the course of the argument, viz.

The want of proper Claimants, of definite claims, and the requisite affidavits to support them.

The connexion of Ogden with a house of trade in the enemy country: the presumption that the partnership was, in fact, interested in what he claimed as his sole property; and that he must be considered as a British merchant, in regard to those transactions originating with his house in Liverpool.

The national character of M'Gregor, which presents itself in the case of the *Venus*.

The presumption that Van Wart resides in England, the claim being by Ogden for Irving and Smith, of New York, *his consignees*; and

The effect of the license.

Tuesday, March 15th.

The case was submitted without further argument: and on

*Wednesday, March 16th. Absent....*MARSHALL, *Ch. J.*

LIVINGSTON, *J.* after stating the facts of the case, delivered the opinion of the Court as follows: |

p. 441 From the manner in which the Appellants have argued this cause, it does not appear that they are very sanguine in their expectations of our reversing the decree of the Circuit Court, on the evidence on which that Court and the District Court proceeded; but that their chief hope is derived from the further proof which they have it in their power to produce, provided an opportunity be afforded them for that purpose. Except as to the property claimed by Mr. Penniman and Mr. M'Gregor, this Court does not perceive how the Circuit Court could have done otherwise, upon the proof before it, than confiscate the cargo of the St. Lawrence, as prize of war. Without meaning to decide, at present, on the right of an American citizen having funds in England, to withdraw them after a declaration of war, or of the latitude which he may be allowed in the exercise of such a right, if it exists, we think the evidence would have justified the Court in considering this property as belonging to enemies of the United States.

The St. Lawrence had gone to England after the war was known, and had sailed from a British port, nearly one year after war had been declared: she was loaded in the country of the enemy, and by persons carrying on trade there: she was furnished with a British license, which extended both to British and American property: and the bills of lading, not being in a very common form, were well calculated to excite suspicion. But these circumstances, strong as they are, might, if every thing had been fair, have been so explained as to have convinced the Court that the property was truly American. Was this done, or even attempted? If we look at the conduct of the master and the Claimants, we find them both acting in a way which left the Court no other safe conclusion but that the cargo of the St. Lawrence was enemy property. The captain, instead of delivering to the captors, or bringing into Court the letters to the consignees, which, no doubt, covered invoices and bills of lading, lets us know, in a way not to be misunderstood, that he had delivered or sent them to the parties to whom they were addressed. Taking his examination with the usual course of business, which is to accompany every shipment with a letter, no doubt can remain that such letters were not only on board, but that they have been regularly received by the |
p. 442 respective consignees; for it is not pretended by the master that they were taken from him by the captors. Here, then, is not only a subduction of very important papers by the master, but an acquiescence in such conduct,

on the part of the consignees, and a continued suppression of the same papers, to this day. The only proof, then, which the Court had of the interest of the Claimants, except of Mr. Penniman's, the master's, and Mr. M'Gregor's, is in the claim of Mr. Ogden, who states that he is not acquainted with their concerns, but believes they had an interest in the cargo; without, however, attempting to designate the packages belonging to either of them. The Court below, therefore, might fairly consider the Claimants as having not only failed in making out a legal title to the property, but as concealing papers which would have shown a title elsewhere.

But if there was a defect of proof below, it is thought the Claimants are entitled to time for further proof; and that, if this be allowed, they will be able to show that the property in question was purchased with American funds which were in England previous to the war, and that the Claimants were the true and *bona fide* owners thereof. It is certainly not a matter of course, in this Court, to make an order for further proof. When the parties are fully apprized of the nature of the proof which their case requires, and have it in their power to produce it, an appellate Court should not readily listen to such an application; but when it appears that the parties who ask this indulgence have most pertinaciously withheld from the Court letters and other documentary testimony, which must be supposed, in this particular case, to have been in their possession, they come with a very ill grace to ask for any further time to make out their title. But if we examine the affidavits which have been made to obtain further time, we shall find them all silent as to the papers which they must have received by the St. Lawrence; for in not one of them is a letter of that kind or an invoice mentioned; nor do they deny that such letters or invoices were received by them. Under such circumstances, this Court thinks that it cannot, consistent with the circumspection with which such applications ought always to be received, allow the Appellants time for further proof. The master's adventure, it is said, has been given up. |

Of Mr. Penniman's claim the Court thinks more favorably. In the p. 443
claim which he filed personally, he not only swears that the property belongs to him, but states very particularly how and when it was purchased. He states, further, that the original invoice and other documentary evidence were at Baltimore; and in the affidavit made by Mr. Campbell, during the present term, there is such a full and distinct history given of this whole transaction, founded upon original letters and bills of exchange, that it is impossible to harbor one moment's doubt that the five chests of merchandize claimed by Mr. Penniman, did, at the time of shipment, and long before, belong to him. To this affidavit is also annexed the original letter and invoice which he received by the St. Lawrence, which must dissipate every doubt on the question, if any had previously existed. Where so strong a case is made out, the Court

is willing to impute to accident or mistake the non-production of these papers below. Perhaps Mr. Penniman thought he did sufficient in stating they were in his possession. Certain it is, he could have no motive for suppressing papers which would have established so conclusively his title to the merchandize which he claimed. The Court, therefore, allows him until next term, to make proof, by affidavit and the production of documents, of his right to the property claimed, at the time of its shipment at Liverpool: and the same indulgence is allowed to the captors.

In regard to the claim of M'Gregor to a part of the cargo, there is also some difference between his case and that of many others of the Claimants. He swears positively to his interest, but that no invoice was delivered to him by the shippers, Ogden, Richards and Seldon. Ogden, also, swears to the interest of Mr. M'Gregor. Perhaps this testimony is sufficient to satisfy a Court, as it did satisfy the District Court, that the property really belonged to Mr. M'Gregor. But if that be the case, other questions will arise of too much importance to be decided on the last day of the term, and when the Court is not full. Whether an American citizen has a right to withdraw his funds from the country of a belligerent, after a war; or if he have, whether he have a right to charter a vessel for that purpose;
p. 444 and, if he may go thus far, whether he may bring British | goods, on freight, to this country, without affecting thereby the safety of his own goods; are questions which the Court does not now decide, and will therefore suspend, at present, giving any final opinion on the claim of Mr. M'Gregor to a part of the cargo; who, in the mean time, is also at liberty to make further proof on the same points with Mr. Penniman;—the captors having the same right.

It may be well doubted whether Mr. Ogden and Mr. M'Gregor have any title to the St. Lawrence: but whether she belong to them or to Messrs. Dickey and Thompson, her fate seems necessarily involved in the decision of the *Rapid*, which was made this term. She went to England since the war, and is taken bringing a cargo from that country. If the whole of the cargo had belonged to Mr. M'Gregor, or any other American returning with his property to the United States, the Court means not to say whether it would or would not have been cause of forfeiture: but when we find but a small portion of the cargo in that predicament, there can be no escape for her. The St. Lawrence was certainly guilty of trading with the enemy; and, being taken on her way from one of his ports to the United States, she is liable, on that ground, to be confiscated as prize of war, to whomever she might belong at the time.

Upon the whole, the sentence of the Circuit Court is affirmed in all its parts, with costs; except so far as it condemned those portions of the cargo which were claimed by Mr. Penniman and Mr. M'Gregor, respecting which this Court will advise until the next term.

The Hiram.—Barker, master.

(8 Cranch, 444) 1814.

Sailing on a voyage under the license and passport of protection of the enemy, in furtherance of his views or interests, constitutes such an act of illegality as subjects the ship and cargo to condemnation as prize of war.

Sailing with a cargo of provisions to the port of a neutral, who is the ally of our enemy in his war with another power, is such a furtherance of the views of our enemy.

THIS was a case of capture, as prize, by the private armed brig Thorn, duly commissioned by the president of the United States, and commanded by Asa Hooper, Esq. |

The Hiram, owned by Samuel G. Griffith, an American citizen, p. 445
sailed from Baltimore on or about the 24th of September, 1812, with a cargo of flour and bread, on a voyage to Lisbon. She was captured on the 15th of October following, and sent into Marblehead, in the district of Massachusetts, for adjudication. She was libelled in the district Court for the said district, by the captors. The vessel was claimed by Barker, the master, in behalf of Samuel G. Griffith; and the cargo by the supercargo, in behalf of said Griffith and various other shippers, American merchants at Baltimore.

Among the papers found on board the Hiram, at the time of her capture, were certain papers commonly called a British license or protection, being a certified copy of a letter from admiral Sawyer to Andrew Allen, esq. late British consul at Boston, and an additional letter of safe conduct from Mr. Allen. It appeared from the evidence, that this license was purchased from a citizen of the United States, and that a part of it was not filled up at the time of the purchase; and that such licenses were a common article of sale in Baltimore and other places.

There was also found on board, the owner's letter of instructions, in which the supercargo was directed to remit the proceeds of the cargo in bills of exchange or government bills to the shipper's correspondents in Liverpool; and moreover to sell the vessel at Lisbon, if an advantageous sale could be made, and remit the proceeds to England.

It appeared from the evidence in the cause, that such remittances in bills of exchange were common among merchants.

The captors claimed condemnation of the vessel and cargo,

1. Because of the British protection or license.

2. Because the remittances were directed to be made in England in bills of exchange.

The district and Circuit Courts both decided that | neither the vessel p. 446
nor cargo were liable to condemnation; but allowed the captors their expenses. From the decree of the Circuit Court both parties appealed.

SWANN, *for Claimants.*

The opinions delivered in the cases of the *Aurora* and the *Julia* may, perhaps, upon first view, be considered as deciding the present case: but upon a closer examination, it will be found that the facts in this case differ materially from those which appeared in the two former.

In the first place, in the case of the *Aurora*, there was an intent to supply the enemy—there was an intent to trade with the enemy: there was a direct violation of the act of congress of 6th July, 1812: but here, there was no such violation. The license, in this case, was merely to trade with the neutral ports of Spain and Portugal. The present case differs from that of the *Julia*, inasmuch as the claim here is for the *cargo* only, and the license is for the *vessel*; whereas there, the license extended as well to the cargo as the vessel.

But these papers do not, in fact, import a license: they only intimate an intended forbearance, on the part of Great Britain, to molest a lawful trade to Spain and Portugal. Here was no sailing under the protection of Great Britain.

Again, this license, as it is called, was purchased as an article of commerce, from a private individual; not from admiral Sawyer nor from Mr. Allen: it is only a copy of admiral Sawyer's letter certified by Allen. The obtaining such a copy of the letter was not unlawful.

Besides, there is no evidence that admiral Sawyer ever gave the directions, mentioned in his letter, to the commanders of the squadron under his command, not to molest American vessels laden and bound as therein described. Indeed, his power to give such instructions does not appear: and if further proof be allowed, we can prove that licenses of this description were, in fact, disregarded in other cases. |

p. 447 DEXTER, *contra.*

In answer to the argument, that the license in this case related to the vessel only, while the claim is for the cargo alone, it may be observed, that the owners of the cargo were the owners of the license, which ought therefore to be considered as extending to the cargo as well as to the vessel. The license was undoubtedly intended as a protection. The voyage was clearly undertaken in furtherance of the views of the British government, as expressed in admiral Sawyer's letter annexed to the pass: and I understand the ground of the decision in the case of the *Aurora* to be, that she sailed under the protection, and in furtherance of the views, of the enemy.

But if the Court should not consider the sailing under the license sufficient cause of condemnation, we contend that this was also a case of indirect trade with the enemy; inasmuch as the proceeds of the cargo were directed by the owner to be remitted from Lisbon to Liverpool in bills of exchange.

SWANN, *in reply.*

Buying a bill of exchange on England is not trading with the enemy. A man may, in an enemy country, purchase a ship from a neutral. 4 *Rob.* 232, 283, *the Countess of Lauderdale.* Sailing under an enemy's pass, without trading with the enemy, is no cause of condemnation.

There was not, in this case, such a subserviency to the views of the enemy, as ought to subject the property in question to the sentence prayed for by the captors. It is certainly lawful for the enemy to relax the rights of war: he may lawfully declare that he will suffer certain vessels to pass: and we conceive that if those vessels sail under the faith of such a declaration, it is no cause of condemnation. The enemy might have declared that he would not capture any vessel navigated wholly by Boston seamen; but surely our government would not condemn a vessel for sailing under the faith of such a declaration. |

*Wednesday, March 16th. Absent....*MARSHALL, *Ch. J.* p. 448

WASHINGTON, *J.* delivered the opinion of the Court.

This vessel was the property of Samuel G. Griffith, an American citizen. On or about the 24th of September, 1812, she sailed, with a cargo of flour and bread, from Baltimore to Lisbon; and on her voyage thither, was captured, on the 15th of October following, by the privateer brig Thorn, and brought into the district of Massachusetts, where she and her cargo were libelled as being enemies' property.

The brig was claimed by the master, in behalf of Griffith, and the cargo by the supercargo, as belonging to the said Griffith, and other shippers, being American merchants of Baltimore. Among the papers found on board of this vessel at the time of the capture, was a letter from admiral Sawyer, dated the 5th of August, 1812, addressed to Andrew Allen, junr. as British consul for the states of Massachusetts, New Hampshire, Rhode Island and Connecticut, which states, that, being aware of the importance of ensuring a constant supply of flour and other dry provisions to Spain or Portugal, and to the West Indies, he should give directions to the commanders of his majesty's squadron under his command, not to molest American vessels unarmed and so laden, *bona fide* bound to Portuguese or Spanish ports, whose papers should be accompanied with a certified copy of that letter under the consular seal of the said Allen; also a letter from the said Allen, dated 15th September, 1812, addressed to all the officers of his majesty's ships of war, or privateers belonging to subjects of his majesty, reciting that it is of vital importance to continue a full and regular supply of flour and other dry provisions to the ports of Spain and Portugal, or their colonies, and that, in consequence thereof, it has been thought expedient by his majesty's government that every degree of protection and en-

couragement should be given to American vessels so laden, and bound to the ports of Spain and Portugal or their colonies, and that, in furtherance of these views of his majesty's government, admiral Sawyer had directed to him a letter dated the 5th of August, 1812, (a copy of which is annexed,) with instructions to furnish American vessels so laden and
p. 449 destined, | with a copy of his letter certified under his, the said Allen's, consular seal, which documents are intended to serve as a perfect safeguard and protection to such vessel in the prosecution of her voyage; and that, in compliance with such instructions, he has granted to the American brig *Hiram*, whereof *John B. Barker* is master, now lying in the port of Baltimore, and laden with flour and bread, bound *bona fide* to Lisbon, a copy of the said admiral Sawyer's letter certified under his consular seal, requesting all officers of his majesty's ships of war, or of private armed vessels belonging to subjects of his majesty, not to offer any molestation to the said vessel, but, on the contrary, to grant her all proper assistance and protection on her passage to Lisbon, and on her return from thence to her port of departure, laden with salt or in ballast only.

Under an order calling upon the different Claimants to give further proof relative to the British license found on board the brig, when and where it was obtained, of whom, and by whom, and on what terms, and, generally, relative to all facts and circumstances concerning the procurement of the same, William Hartshorn made an affidavit stating that he purchased for Mr. Griffith, the owner of the vessel, in September, 1812, from John R. Waddy, of Virginia, but then in Baltimore, a citizen of the United States, a license to protect a vessel laden with provisions and bound to Lisbon, from capture by British cruizers, for which he was to pay one dollar per barrel for what the vessel would carry, payable $500 in cash, and the balance on the safe arrival of the vessel at Lisbon: that the said license was in blank, for inserting the names of any vessel and master: and that the blanks in the said license were filled up in his presence. This witness, as well as others, states that these licenses form an article of traffic in market, as much so as flour.

The vessel and cargo were acquitted in the District Court, and a *pro forma* decree of affirmance made in the Circuit Court; from which decree an appeal to this Court was taken.

In the case of the *Julia*, decided at this Court, it was laid down in general terms, 'that the sailing on a voyage under the license and pass-
p. 450 port of protection of the | enemy, in furtherance of his views or interests, constitutes such an act of illegality as subjects the ship and cargo to confiscation as prize of war;' and, as explanatory of the general reasons for that opinion, a reference was made to the opinion of the learned judge who decided that case in the Circuit Court.

It is contended by the counsel for the Claimants, that the facts in this case differ so materially from those which appear in the case of the *Julia*, that the principles of law which ruled that case are inapplicable to this, and, consequently, ought not to govern the decision of the Court upon it.

There certainly are some differences in the two cases; and these were considered sufficiently strong by the district judge who acquitted this vessel and cargo, to condemn the *Julia* and her cargo.

The important circumstance which appears to have influenced the decision of the district judge in that case, was, that the license contemplated the means of ensuring a *constant supply* of dry provisions *to the allied armies* in Spain and Portugal, and, consequently, an unlawful connexion with the enemy to supply his armies, and a subserviency to the interests of that enemy. In this case, no such views are expressed in the license of admiral Sawyer; yet the Court must be wilfully blind not to see that this was, in reality, the object of admiral Sawyer and of Mr. Allen, and that it must have been so understood by those who sailed under this license.

In both cases, the allied armies were to be supplied, not by sales made directly to their agents, (for this is not required by either,) but by carrying supplies to the Peninsula, which would indirectly come to their use. The license, as well as the letter of Allen accompanying it, points out the great importance of such supplies being sent to Spain and Portugal; and the latter adds, that, in furtherance *of these views of his majesty's government*, he had been directed by admiral Sawyer to furnish a copy of his letter to vessels so laden and destined. Can it be said that an American citizen, sailing under the protection of papers professing such to be the views of the British government, does not act in such a manner as to subserve | the views and interests of the enemy? Upon the whole, p. 451
the Court is of opinion that there is no substantial difference between this case and that of the *Julia*; and that this is fully within the principle laid down by this Court in deciding that case, and the reasoning to which it refers.

It was stated, on the behalf of the Claimants of the cargo, that they ought not to be affected by the illegal act of the owner of the vessel in sailing under the protection of this license. It is a sufficient answer to this argument to observe, that, in this case, the Court must presume that the license was known to the owners of the cargo, if it was not the joint property of all. It is inconceivable that the owner of the vessel should expend about $1600 for the protection of a cargo in which it appears he was not largely concerned, without communicating such an advantage to his shippers, and even requiring some reimbursement, either by demanding higher freight, or compensation in some other way.

But what is conclusive on this point, is, that an order for further proof in relation to this license was made, and yet no affidavit or proof is offered by any of the owners, denying a knowledge of these documents being on board.

The decree must be reversed, and the vessel and cargo condemned to the captors as prize of war.

The Joseph.—Sargeant, master.

(8 Cranch, 451) 1814.

Case of hostile trade. Not excused by the necessity of obtaining funds to pay the expenses of the ship; nor by the opinion of an American minister, expressed to the master, that by undertaking the voyage he would violate no law of the U. States. If an American vessel be captured on a circuitous voyage to the U. States, in a former part of which voyage she has been guilty of conduct subjecting her to confiscation, though at the time of capture she is committing no illegal act, she must be condemned. Where the termini of a voyage are already fixed, the continuity of such voyage cannot be broken by a voluntary deviation of the master, for the purpose of carrying on an intermediate trade. A capture as prize of war may lawfully be made within the territorial limits of the U. States, at any place below low-water mark.

THIS was the case of a vessel, *the Joseph*, owned by American citizens, captured by the privateer *Fame* on the 16th of July, 1813. The *Joseph* sailed from Boston with a cargo on freight, on or about the 6th of April, 1812, on a voyage to Liverpool and the north of Europe, and thence directly or indirectly to the United States. She arrived in Liverpool, and there discharged her cargo; and, on the 30th of June following, with another cargo, of mahogany, taken in at Hull, sailed for St. Petersburg under the protection of a British license, granted on the 8th of
P. 452 June, 1812, authorizing | the export of mahogany to St. Petersburg, and the importation of a return cargo to England. The brig arrived at St. Petersburg, and there received news of the war between the United States and Great Britain. About the 20th of October, 1812, she sailed from St. Petersburg for London, with a cargo of hemp and iron on freight, consigned to merchants in London; and, having wintered in Sweden, in the spring of 1813 she sailed, under convoy instructions from the British ship *Ranger*, for London, where she arrived and delivered her cargo. About the 29th of May she sailed for the United States, in ballast, under a British license; and was captured, on the 16th of July, at no great distance from Boston light-house. She was sent into the port of Salem for adjudication, as prize.

In the District Court of Massachusetts the claim of the owners, Messrs. Dall and Vose, was rejected, and the property condemned to the United States. From this decree the captors and Claimants appealed.

In the Circuit Court the property was condemned to the captors. From this decree the Claimants and the United States appealed.

It was contended, on the part of the Claimants,

1. That it was lawful, in June, 1812, (before the war) to take the license to go from England to the north of Europe, and to bring back a cargo to England.

2. That the taking a freight from the north of Europe to England was from necessity, to obtain funds to pay the debts of the ship, the master not having been able to sell the cargo at St. Petersburg for any price.

3. That the opinion of the minister of the United States at St. Petersburg, who told the captain of the Joseph that there was no law against his returning to England under the protection of his license, and who also sent dispatches by the Joseph to the government of the United States, though he knew of the intention to return to England and thence to the United States, was, in effect, a license, especially as to the claim of the United States. |

4. That there was no trade with the enemy, but with neutrals only; p. 453
the freight having been taken on neutral account, in a neutral territory, and delivered to a neutral house in Great Britain.

5. That if any offence was committed, it was completed upon the delivery of the freight in Great Britain; and that therefore the vessel was not liable to capture or seizure, on that account, in a subsequent voyage from Great Britain to the United States.

6. That if she was liable to seizure for having adopted the character of an enemy vessel by any act contrary to the allegiance of the owners, yet she was not to be condemned as prize to the captors, as she was *voluntarily returning* to the United States and her port of discharge, and had actually arrived within the district of Massachusetts. That the capture, therefore, was not the occasion of her being brought in; so that if she was liable at all, even as enemies' property, the condemnation must be to the United States as a *droit of admiralty*. But,

7. That the vessel was not liable to be condemned to the United States, because the declaration of war was, in effect, an invitation, if not a command, to the citizens of the United States, abroad at the time, to return home, and the law allowed a reasonable time and way to effect that return.

PITMAN, *for the captors*, contended,

1. That the facts appearing in the case proved a trading with the enemy, which subjected the vessel to confiscation as prize.

2. That the vessel was not captured within the territorial jurisdiction of the United States: that this appeared from the preparatory examinations of the master and the mate, the first of whom stated 'that he was

captured in sight of Half-way-rock, off Salem harbor,' which was a marine league from the shore; and the latter, 'that the vessel was captured about two leagues east from Boston light-house.' |

p. 454 3. That, though the fact be admitted as contended for by the Claimants, yet the captors were authorized by their commission to capture within the territorial jurisdiction of the United States on the high seas, which were stated in their instructions as extending to low-water mark.

*Wednesday, March 16th. Absent....*MARSHALL, *C. J.*

WASHINGTON, *J.* after stating the facts of the case, delivered the following opinion of the Court:

After the decision of this Court in the cases of the *Rapid* and of the ship *Alexander*, it is not to be contended that the sailing with a cargo, on freight, from St. Petersburg to London, after a full knowledge of the war, did not amount to such a trading with the enemy as to have subjected both the vessel and cargo to condemnation as prize of war, had she been captured whilst proceeding on that voyage. The alleged necessity of undertaking that voyage to enable the master out of the freight to discharge his expenses at St. Petersburg, countenanced, as the master declares, by the opinion of our minister at St. Petersburg, that by undertaking such a voyage he would violate no law of the United States, although these considerations, if founded in truth, present a case of peculiar hardship, yet they afford no legal excuse which it is competent to this Court to admit as the basis of its decision. See the *Hoop*, 1 *Rob. Potts and Bell*, 8 *T. Rep.*

The counsel for the Claimants seemed to be aware of the insufficiency of this ground, and applied their strength to show that the vessel was not taken *in delicto*, having finished the offensive voyage in which she was engaged, at London, and being captured on her return home and in ballast. It is not denied that if she be taken during the same voyage in which the offence was committed, though after it was committed, she is considered as being still *in delicto*, and subject to confiscation; but it is contended that her voyage ended at London; and that she was, on her return, embarked on a new voyage. This position is directly contrary to the facts in the case. The voyage was an entire one from

p. 455 the United States to England, thence to the north of | Europe, and thence directly or indirectly to the United States. Even admit that the outward and homeward voyages could be separated, so as to render them two distinct voyages, which is not conceded, still it cannot be denied that the *termini* of the homeward voyage were St. Petersburg and the United States. The continuity of such a voyage cannot be broken by voluntary deviation of the master for the purpose of carrying on an intermediate trade That the going from St. Petersburg to London was not under-

taken as a new voyage, is admitted by the Claimants, who allege that it was undertaken as subsidiary to their voyage to the United States. It was, in short, a voyage from St. Petersburg to the United States by the way of London; and, consequently, the vessel, during any part of that voyage, if seized for conduct subjecting her to confiscation as prize of war, was seized *in delicto*.

Another objection relied upon by the Claimants, is, that this vessel was captured within the territorial limits of the United States. The fact upon which this objection is raised is not clearly established one way or the other. But admit it to be as contended for by the Claimants, the law is nevertheless against them. The commission granted to privateers authorizes them to seize and take any British vessels found within the jurisdictional limits of the United States, or elsewhere on the high seas, and to bring them in for adjudication; and also to detain, seize and take all vessels and effects, to whomsoever belonging, which shall be liable thereto according to the law of nations and the rights of the United States, as prize of war. The first instructions given by the president to the private armed vessels of the United States, define the high seas, referred to in the commission, to extend to low-water mark, with the exception of the space of one league, or three miles, from the shore of countries at peace with Great Britain or the United States. The general expressions of the commission, explained by these instructions, and containing no exception but in relation to friendly powers, prove incontestibly that all captures as prize of war may lawfully be made within the territorial limits of the United States, at any place below low-water mark.

The Court is also of opinion that there is no weight | in another objec- p. 456
tion made by the Claimants, that this vessel was on her way and near to an American port at the time she was captured. The right of the captor to the property which he may seize as prize of war is derived under his commission, which is general and unqualified as to place and circumstances, and not from any peculiar merit which he may claim in any particular case. It is not for him to know whether a vessel which has offended against the law of nations, and is apparently destined to a port of the United States, will certainly enter the port: and certainly he is bound by no law to forego the opportunity which chance or his own vigilance may have presented to him to acquire property which, under his commission, he is authorized to appropriate to himself.

Decree affirmed.